Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 3058/14

In the matter between:

IMATU OBO ITS MEMBERS **Applicant**

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **First Respondent**

Heard: 14 September 2016

Delivered: 12 October 2016

Summary: (s158(1)(c) – essential service – award on mutual interest dispute – opportunity to negotiate a solution – effect of expiry of collective agreement- counter application to set aside the award on grounds of impracticality)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an application to make an arbitration award an order of court in terms of section 158 (1) (c) of the Labour Relations Act, 66 of 1995 ('the LRA'). The arbitration award was an award made in terms of section 74 (4)

of the LRA in determining a mutual interest dispute in an essential service, the essential service in question being municipal traffic.

[2] The municipality and its traffic officers had been in dispute over whether the traffic officers should work a 12 hour or eight hour shift system. The municipality was in favour of an 8 hour system and the traffic officers preferred the 12 hour system which prevailed at the time the arbitrator heard the dispute.

[3] A collective agreement had been concluded between the municipality, IMATU and SAMWU on 15 June 2006 on the "Uniform Fixed Allowance for Operational Tshwane Metropolitan Police Personnel as well as a New Shift System in the Tshwane Metropolitan Police Department ("TMPD") of the City of Tshwane Metropolitan Municipality". That agreement set out the terms under which a 12 hour shift system would be worked. Although the agreement expired on 30 June 2011 in terms of clause 9 of the same agreement, 12 hour shifts continued to be worked until 1 May 2013 when the municipality unilaterally implemented an 8 hour shift system.

[4] The arbitrator found that on the expiry of the collective agreement, the conditions under which the 12 hour shift system was worked continued to apply because the terms in the agreement had become incorporated in the affected officers' contracts of employment.

[5] The arbitrator made an award which gave the parties yet another opportunity to resolve the dispute before he imposed a binding solution on them. He found that the unilateral implementation of the 8 hour shift system was unfair and made the following order to resolve the dispute:

> "6.2 The issue concerning the change in the shift system with in the TMPD is to be negotiated and consulted At the Local Labour Forum within a period of 6 months from the date of this award;
>
> 6.3 should agreement not be reached within the above-mentioned 6 month period regarding a new shift system then:
>
> 6.3.1 The respondent's decision to unilaterally implement the 8 hour shift system shall be deemed to be rescinded forthwith;
>
> 6.3.2 The 12 hour shift system within the TMPD, which existed prior to 1 may 2013, shall be reinstated"

[6] However, the parties did not reach agreement on a new shift system within the six-month time period and accordingly paragraph 6.3.2 of the award became applicable. At the time the section 158 (1) (c) application was made in April this year, the municipality had reverted to the 8 hour shift system it had previously unilaterally imposed.

[7] The municipality opposed the application to have the award made an order of court. It also brought a counter application as part of its answering papers for an order that the award was not capable of practical implementation and should be set aside.

Merits

The Counter Application

[8] The counter application was brought on the basis that paragraph 6.3.2 of the award was not capable of practical implementation. Although it was not articulated with great clarity, this was partly motivated on the basis that there were financial implications which were linked to the shift system which needed to be resolved.

[9] *Mr Tsatsawane*, who appeared for the municipality, conceded that essentially the counter application raised the same point that was raised in defence to the section 158 application and if that defence failed, the counter application would also fail. Quite apart from that, if the counter application were entertained by the court it could only be considered in the context of a review application and since it was filed at the end of June 2015, well over a year after the award was handed down, the counter application could not be considered without the late filing thereof being condoned. Accordingly, as this was not done, the court would not have jurisdiction to entertain it in any event.

Effect of the expiry of the collective agreement

[10] The fundamental objection to the enforcement of the award raised by the municipality is that if the court were to give effect to the arbitration award, it would be tantamount to giving effect to a collective agreement which

expired on 30 June 2011. The underlying logic of the argument is that the arbitrator's reinstatement of the 12 hour shift system which prevailed until the municipality unilaterally changed it to an 8 hour system on 1 may 2013 meant that he was giving effect to an agreement which had expired. The arbitrator dealt with the effect of the expiry of the collective agreement by finding that its terms have been incorporated in the officers' contracts of employment, which seems to be a sound conclusion.

[11] In any event, whatever the legal merits of that finding are, there was a period between the expiry of the agreement on 30 June 2011 and the period ending 30 April 2013 during which the municipality continued to apply the 12 hour shift system. During that time, it must have implemented the shifts and paid them allowances arising from that work on a definite basis. The effect of paragraph 6.3.2 of the award was simply to require the municipality to continue implementing the 12 hour shift system on the same basis that applied before it unilaterally changed it on 1 May 2013. Effectively, this was akin to a status quo order and it did not matter for the purposes of the award, what the legal basis was for the status quo on 30 April 2013. The arbitrator, in exercising his power to make an award under section 74 (4) of the LRA determined that the Status Quo would be legally binding on the parties if they were not able to negotiate an agreed shift system in the six-month period he gave them.

[12] The municipality argued amongst other things that it would amount to imposing new legal terms on the parties. It must be remembered that in an essential service arbitration, the arbitrator fulfils the function of arriving at a binding solution which the parties could not reach themselves. Just as the conclusion of a collective agreement will often result in a variation of the pre-existing rights and obligations of the parties, so too an essential service arbitration award on a mutual interest matter can also have the same effect, and it is well within the powers of an arbitrator under section 74 (4) to do that. Thus, even if the arbitrator was not correct in finding that the terms of the expired collective agreement had been incorporated in the officers' contracts, and even if the legal status of the prevailing shift system and the associated benefits on 30 April 2013 is debatable, the arbitrator's award converted the status quo into a legally binding

arrangement going forward from late September 2014 when the six-month grace period for further negotiations expired. Obviously, it remains open to the parties to vary the shift system by negotiating an agreed alternative and reducing it in a new collective agreement.

[13] At the hearing of the matter, the municipality asked the court to consider assisting the parties in reaching a practical solution to their dispute over the shift system by ordering that negotiations between them should be independently facilitated for a period of a month failing which the parties could come back to the court for further directions. While, this approach has some appeal in that it might result in a negotiated and therefore agreed outcome of the shift system, in the context of the application before the court such an order could have the consequence that the court would effectively be sidestepping its duty to deal with the application before it. In any event, the parties have had ample opportunity to find an alternative solution to the application of paragraph 6.3.2 of the award. Not only did they have six months to reach an alternative agreement, fully knowing what the consequences of not doing so would be, but more than two years have passed since the award was handed down. I accept though that sometimes it is only when the proverbial sword of Damocles is truly visible and its fall is imminent that parties finally apply their minds to finding a genuine mutually acceptable solution, without simply digging in their heels and insisting on their entrenched negotiating positions. Accordingly, as indicated to parties at the hearing of the application I have delayed handing down judgement in the matter by a month to allow them to find common ground which has eluded them so long.

[14] In the absence of being advised by either party that the dispute was settled, the following order is made.

Order

[15] The arbitration award of the arbitrator, Mr T Boyce, under case number MD031303, dated 21 March 2014 issued under the auspices of the South African Local Government Bargaining Council is made an order of court in terms of section 158 (1)(c) of the LRA.

[16] The respondent must comply immediately with the provisions of the award, and in particular paragraph 6.3.2 thereof by immediately reinstating the 12 hour shift system which existed and was being implemented immediately prior to 1 May 2013 in the respondent's Metro Police Department.

[17] The respondent's counter application is dismissed.

[18] The respondent must pay the applicants costs of the application and the counter application.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	G v.d Westhuizen instructed by Tim Du Toit Attorneys
RESPONDENT:	K Tsatswane instructed by Gildenhuys Malatji Inc.