REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 3455/17

In the matter between:

SUN INTERNATIONAL LIMITED **First applicant**

AFRISUN GAUTENG (PTY) LTD t/a **Second applicant**

CARNIVAL CITY

and

SACCAWU **First Respondent**

INDIVIDUAL RESPONDENTS LISTED IN ANNEXURE "A" **Second and further respondents**

Heard: **31 December 2017**
Delivered: **31 December 2017**
(written reasons provided on 9 February 2018).

Summary: Urgent application to declare strike unprotected. Rule *nisi* granted.

JUDGMENT

STEENKAMP J

Introduction

[1] This urgent application was heard on New Year's eve, 31 December 2017. I issued a rule *nisi* in the following terms:

> "2. that a rule nisi do hereby issue calling upon the Respondents to show cause, if any, on 1 March 2018, why an Order should not be granted in the following terms:
>
> 2.1 declaring the strike action of the Respondents in support of their demand and/or grievance concerning the introduction and application of the upgraded version of the Kronos time and attendance system to be unprotected in terms of the Labour Relations Act, 66 of 1995, as amended;
>
> 2.2 interdicting and restraining the Respondents from inciting, encouraging, participating in, or otherwise acting in furtherance of strike action in relation to the aforesaid demand and/or grievance;
>
> 2.3 ordering the Respondents to pay the costs of this application;
>
> 3. that the provisions of paragraphs 2.1 and 2.2 shall operate as independent interim interdicts and orders, pending the return date of this application; and
>
> 4. service of this Order shall be effected as follows:
>
> 4.1 on the First Respondent, by serving a copy thereof by e-mail on the First Respondent's offices; and
>
> 4.2 on the Second to Further Respondents, by delivering a copy thereof to a shop steward employed at the Second Applicant, by affixing copies thereof to at least three prominent locations at the entrance to the Second Applicant's premises and making further copies available for collection by any of the Second to Further Respondents."

[2] The applicant has asked for written reasons for the ruling. Although I provided brief reasons for the ruling at the time of hearing, they were not recorded. Keeping in mind that only a rule *nisi* was issued and that the matter will still be argued fully on the return day, I reiterate in writing here the brief reasons I gave on the day of the hearing of the initial urgent application.

Background facts

[3] SACCAWU has given notice to call its members at Carnival City out on strike at 16:00 on 31 December 2017, about three hours hence. It relies on a certificate of outcome issued by the CCMA on 31 September 2017.

[4] The underlying dispute concerns a clocking system. Workers used to clock in and out with a staff card. The system is known as Kronos. In April 2017 the applicants introduced a new biometric Kronos system. SACCAWU alleged that it is a unilateral change to terms and conditions of employment. The applicants say it is merely a change in work practices. And in any event, the initial dispute was settled at the CCMA on 11 September 2017. Despite that, a CCMA commissioner issued a certificate on 21 September 2017 stating that the dispute remained unresolved.

Evaluation / Analysis

[5] Mr *Van Zyl*, for the applicants, initially relied on seven discrete arguments for the relief they seek. At the hearing he abandoned three of those. The matter was heard on that basis. And Mr *Molotsi*, for SACCAWU, did not take issue with urgency or short notice (i.e. less than the 48 hours required by s 64). Mr *Van Zyl* persisted with these arguments:

5.1 The dispute does not concern a unilateral change to terms and conditions of employment.

5.2 The certificate on which the union relies has no legal effect.

5.3 Even if there was a unilateral change (which is denied), the union cannot strike and must rely on other remedies.

5.4 The strike notice is defective.

Requirements for interim interdict

[6] The well-known requirements for an interim interdict are:

6.1 a *prima facie* right that may be open to some doubt;

6.2 a reasonable apprehension of irreparable harm to such right if the interdict were not to be granted;

6.3 the balance of convenience favours the granting of the interdict; and

6.4 the absence of any other adequate remedy.[1]

[7] As will be apparent from the reasons below, I am satisfied that the applicants have made out a case for interim relief based on a *prima facie* right, though open to some doubt. They are faced with imminent and irreparable harm in a few hours' time and they have no adequate alternative remedy; and the balance of convenience clearly favours them.

The certificate of non-resolution

[8] The union relies on the certificate of non-resolution as the basis for its strike action. But the underlying dispute has been resolved.

[9] As will appear below, I agree with Mr *Van Zyl* that, on the evidence before me at this stage, the dispute regarding the introduction and application of the upgraded Kronos system does not amount to a unilateral change in terms and conditions of employment and, therefore, the employees are not entitled to embark on strike action to enforce demands in this regard; and in any event, the dispute has been finally resolved by means of a settlement agreement constituting a collective agreement.

Is the dispute about a unilateral change to terms and conditions of employment?

[10] Mr *Van Zyl* accepted that the union referred a dispute to the CCMA concerning its contention that a unilateral change to terms and conditions of employment has occurred, and that a certificate of non-resolution was issued in those terms. But, he argued, the allegation that a unilateral change to terms and conditions of employment has occurred is not borne out by the evidence.

[11] The distinction between changes to terms and conditions of employment, as opposed to mere work practices, has enjoyed the attention of this Court on several occasions. In *Johannesburg Metropolitan Bus Services (Pty)*

[1] Setlogelo v Setlogelo 1914 AD 221 at 227; Webster v Mitchell 1948 (1) SA 1186 (W).

Ltd v SAMWU and Others[2] the Court analysed the employer's proposed introduction of a new shift schedule within the following framework:

'[36] … The question remains whether it [the new shift schedule] amounts to a unilateral change to terms and conditions of employment. If the shift schedules comprise terms of employment, they could only be changed by agreement; and if it were to be changed unilaterally, the unions could embark on a protected strike.

[37] In *SA Police Union v National Commissioner of the SA Police Services* [2006] 1 BLLR 42 (LC) this court dealt with a very similar question. In that case, SAPS implemented an 8 hour shifty system in the place of the prevailing 12 hour system. The trade union objected on the basis that it was a unilateral change to terms and conditions of employment. Murphy AJ commented as follows after having regard to the relevant collective agreement and contracts of employment:

'In short, it was not a term of the contract of employment that employees working 12 hour shifts would always be entitled to do so. Without express, implied or tacit contractual rights to such effect, the employees do not have vested right to preserve their working times unchanged for all times. The alternation of shifts does not result in the employees being required to perform a different job thereby entitling them to claim a material breach or alteration in the supposition of the contract. The change in timing does not amount to a change in the nature of the job. The shift system was accordingly merely a work practice not a term of employment.

…

[40] In the case before me, SAMWU has not been able to point to any term contained in a collective agreement or in the bus drivers' contracts of employment that accords them a vested right to a specific shift schedule. They have vested rights in relation to maximum working hours; and the right to pick shifts according to seniority. These rights have not been changed or infringed.

Conclusion

[41] The changes implemented by Metrobus comprise no more than a change in work practice. It does not amount to a unilateral change in the

[2] [2011] 3 BLLR 231 (LC) par 36.

> bus drivers' terms and conditions of employment. Therefore, the trade unions representing the drivers do not have the right to strike over a unilateral change to terms and conditions of employment in terms of section 64(4) of the LRA.'

[12] In *Ram Transport SA (Pty) Ltd v SATAWU and Another* [2011] JOL 26805 (LC) Van Niekerk J cited with approval and applied the approach in *Johannesburg Metropolitan Bus Services supra*. In distinguishing between a work practice and a term of employment the court remarked as follows:

> 'This distinction has its roots in the principle that employees do not have a vested right to preserve their conditions of employment completely unchanged from the moment they are employed. In *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA* [1995] 4 BLLR 11 (LAC) the court distinguished between 'terms of employment' on the one hand and 'work practices' on the other, the latter being subject to the employer's prerogative and its introduction not constituting a unilateral change.'

[13] In similar vein, the Labour Court (per Gush J) reiterated the principle as follows in *Apollo Tyres South Africa (Pty) Ltd v National Union of Metalworkers of South Africa ('NUMSA') and Others* [2012] 6 BLLR 544 (LC):

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

[14] On the evidence before me at this stage there is no suggestion that the parties have contracted on a basis that serves to fetter the employer's right to implement the work practice related to the upgrading of the Kronos system, as more fully set out in the founding affidavit of Verna Robson.

The certificate and alternative remedies

[15] Mr *Van Zyl* referred to *Independent Commercial Hospitality and Allied Workers Union v CCMA, Mgubasi NO and Suid-Kaap Stene Electroplating and Powercoating CC*[3]; in which the court held that employees faced with a true unilateral change to terms and conditions of

[3] (2015) 36 ILJ 3086 (LC); [2015] 9 BLLR 958 (LC).

employment -- which, on the papers before me, is not the case here -- in any case only have available the following remedies:

15.1 to strike, for the period of conciliation, without complying with the normal statutory conciliation requirements and without giving the normal 48 hours' notification of intended strike action;

15.2 to bring an application for an interdict seeking compliance with the notice to restore the *status quo* (s158(1)(b) read with s64(5) of the LRA); and

15.3 to resist such change and to tender their employment on their existing terms and conditions of employment.

[16] Even if the present dispute did comprise a change in terms and conditions of employment and not a change in workplace practice, then the respondents are *prima facie* prohibited from relying on the certificate of non-resolution in order to embark on a protected strike.

The settlement agreement

[17] It also appears to me *prima facie* that the intended strike is unprotected because, in terms of s65(3)(a)(i) of the LRA, the parties are bound by the collective agreement (the settlement agreement at the CCMA) that regulates the issue in dispute. [4]

The strike notice

In *SA Airways (Pty) Ltd v SATAWU* [2010] 3 BLLR 321 (LC), the court said:

> 'The same purposive approach adopted by the Labour Appeal Court requires that a strike notice should sufficiently clearly articulate a union's demands so as to place the employer in a position where it can take an informed decision to resist or accede to those demands. In other words, the employer must be in a position to know with some degree of precision which demands a union and its members intend pursuing through strike action, and what is required of it to meet those demands.'

[4] *Samancor Ltd v National Union of Metalworkers of SA and Others* (2000) 21 *ILJ* 2305 (LC); *Unitrans Fuel and Chemical (Pty) Ltd v Transport and Allied Workers Union of SA and Another* (2010) 31 *ILJ* 2854 (LAC).

[18] And with reference to the constitutional court judgment in *South African Transport and Allied Workers Union and Others v Moloto NO and Another* [2012] 12 BLLR 1193 (CC), the labour court, subsequently, in *National Union of Food, Beverage, Wine, Spirits and Allied Workers and Others v Universal Product Network (Pty) Ltd* (2016) 37 *ILJ* 476 (LC); [2016] 4 BLLR 408 (LC); held, in line with the above approach, that the principle to be extracted is that a strike notice had to place the employer in a position reasonably to know which demands a union and its members intended to pursue through strike action and that it had, therefore, to meet, to avoid the prospect of industrial action.

[19] In this case the union has not articulated any demands in its strike notice. It is impossible for the employer to consider its position as it does not know what is required in order to either avoid the strike, to meet the relevant demands or to minimise the risks attached to the strike.

Conclusion

[20] It is for these reasons that I granted the rule *nisi*.

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Steenkamp J

APPEARANCES

APPLICANTS:	Brian van Zyl Instructed by Van Zyl Rudd Inc, Port Elizabeth.
RESPONDENTS:	S Molotsi.