REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA82/13

Reportable

In the matter between:

PIKITUP (SOC) LIMITED **Appellant**

(Applicant *a quo*)

and

SAMWU obo MEMBERS **First Respondent**

EMPLOYEES OF APPLICANT **Second to Further respondents**

LISTED IN ANNEXURE 'A' TO

NOTICE OF MOTION

Heard: **12 September 2013-**

Delivered: **05 December 2013**

Summary: Right to strike- health and safety issues- whether such issues are matters of mutual interest. Whether demand that breathalyser testing should be abandoned amounts to an unlawful demand.

CORAM: Tlaletsi ADJP, C.J. Musi et Mokgoathleng AJJA

JUDGMENT

C.J. MUSI, AJA

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[1] This is an appeal, with the leave of the Court *a quo*, against the judgment of the Labour Court. The appeal is about the right to strike. It essentially concerns two issues, firstly, whether the demand by the first respondent (the union), that the appellant should abandon the conducting of breathalyser testing at its workplace is an unlawful demand and secondly, whether health and safety issues are matters of mutual interest. If the demand is unlawful or the issues are not matters of mutual interest, then any work stoppage pursuant thereto, would be unlawful.

[2] The appellant is a municipal entity, as defined in the Local Government Municipal Systems Act and renders waste management services in the greater Johannesburg area on behalf of the Johannesburg Metropolitan Municipality.[1] The appellant's employees collect refuse from households and businesses within the City of Johannesburg utilising, *inter alia*, specialised trucks belonging to the appellant.

[3] The appellant employed two hundred and sixty two (262) drivers. It alleged that it experienced serious and pervasive problems with employees reporting for duty under the influence of alcohol, consequently, it introduced mandatory alcohol testing, through a breathalyser device, for its drivers and random alcohol testing for its other employees.[2]

[4] The union, on behalf of its members, objected to the introduction and use of the breathalyser device. On 30 April 2013, the union referred a dispute, relating to the breathalyser and biometric devices, for conciliation to the Commission for Conciliation, Mediation and Arbitration (CCMA). The dispute could not be resolved; consequently the CCMA issued a certificate of non-resolution. The union gave notice to the appellant of its intention to embark on strike action with effect from 29 July 2013.

[5] On 24 July 2013, the appellant sought and was granted, on an urgent basis, a rule *nisi* by Snyman AJ in the following terms:

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[1] See section 1 of the Municipal Systems Act, 32 of 2000 for the definition of a municipal entity.

[2] The appellant also introduced a biometric access control device. The respondents objected to the introduction of both devices. The issue relating to the biometric device was settled and the only live issue in the Court *a quo* was the one relating to the breathalyser device.

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"1. Condonation is granted for the applicant's failure to comply with the time limits as contemplated by Sections 68(2) and (3) of the Labour Relations Act 66 of 1995, and the applicant is permitted to bring this application on shorter notice.

2. This application is heard as one of urgency in terms of Rule 8 and the time limits imposed by Rule 7 are hereby and herewith dispensed with.

3. A Rule *nisi* is hereby issued calling upon the respondents to show cause on 12 September 2013 at 10h00 why a final order should not be made in the following terms:

3.1 The strike which the second to further respondents intend to embark upon on 29 July 2013 in terms of the notice in terms of Section 64(1) (b) of the Labour Relations Act given by the first respondent and dated 17 July 2013, is declared to be an unprotected strike as contemplated by Section 68(1) of the Labour Relations Act.

3.2 The second to further respondents are interdicted and restrained from embarking upon any strike action or conduct in contemplation of strike action in respect of the strike declared to be unprotected in terms of paragraph 3.1 above.

3.3 The first respondent is ordered to immediately call upon the second and further respondents not to commence strike action in respect of the strike declared to be unprotected in terms of paragraph 3.1 above.

3.4 The first respondent is ordered to take all reasonable steps necessary to ensure that the second to further respondents do not commence strike action on 29 July 2013, including but not limited to actively communicating and consulting with the second to further respondents, before 29 July 2013.

4. The provisions of paragraphs 3.1, 3.2, 3.3 and 3.4 of the rule *nisi* shall operate as an interim order with immediate effect, pending the return date of 12 September 2013, and the first respondent and second to further respondents shall be required to immediately adhere to the same and give effect to the same…

6. The issue of costs is reserved for argument on 12 September 2013.

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> 7. Written judgment pursuant to the granting of this order will be handed down on 5 August 2013."

[6] The union anticipated the return date, as a result the matter was argued before Hulley AJ on 5 August 2013. He discharged the rule *nisi* with costs. This appeal is against Hulley AJ's judgment.

[7] The genesis of the implementation of the mandatory/random testing of the appellant's employees for alcohol consumption is not entirely clear from the record. This is caused, in part, by the fact that the appellant attached a variety of documents to its founding affidavit without properly contextualising them. Although it alleged that the documents are self-explanatory, some of them caused one to ask more questions than it provided explanations or answers.

[8] During 2009, one of the appellant's drivers, Mr M P Motlou, was involved in a motor vehicle collision. He succumbed to the injuries sustained during the collision. An insurance claim lodged by the appellant was repudiated by its insurers, because the deceased had driven the vehicle whilst having more than the legal limit of alcohol in his blood. The repudiation prompted the General Manager: Fleet of the appellant to write an email to *inter alia* Ms Johanna Joja, the Employee Wellness Manager, of the appellant. The email, in part, reads as follows:

> "… In effect it would mean that every claim related to this accident is at risk. The driver's family will lose the benefit of his death benefit and there is a chance that the vehicle claim of approximately R250k could also be repudiated. This raises considerable risk to the business and I recommend that we strongly push the aspect of random testing of the drivers."

[9] The documents also contained anecdotal evidence of collisions in which the appellant's drivers were involved, of which four were proved to have occurred whilst the appellant's drivers were under the influence of alcohol.

[10] According to a report drafted by Ms Joja on 11 December 2011, the appellant's Alcohol and Driving Abuse Policy was reviewed and the substance abuse testing programme was included in the policy. It is not clear when this was done, however the substance abuse testing programme was launched on

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23 October 2010 at the appellant's Head Office. According to the aforementioned report "EXCO" recommended that the testing programme should continue at Head Office. It also recommended that "negotiations continue with Employee Wellness and Organised Labour concerning the roll-out of the testing programme to all depots".

[11] In her report to the Executive Director: Corporate Services dated 12 April 2013, she repeated the EXCO's recommendations and stated:

> "Negotiations with labour were initiated but there was never an agreement between Labour and Employee Wellness on the issue of testing. Presentations at LLF never brought any changes in Labour's stance on the testing programme."

[12] Ms Joja did not state what the irreconcilable differences were between the union and her Department. The minutes of the meeting of the Pikitup Local Labour Forum held on 8 December 2010 sheds more light on the issue. The minutes read as follows:

> "5.8 Organised Labour
>
> - Submitted that the issue of subjecting employees to the breathalyser has to be treated within the Employee Assistance Programme that the company has.
> - Is very unhappy about this exercise as it does not even know how safe are the tools used and how accurate they are.
> - Stated that this practice must be withdrawn and must be included in the Employee Assistance Programme and the company's Code of Conduct.
> - Stated that the exercise of testing people is degrading to the people being tested.
>
> Management
>
> - Management stated that the establishment of the Employee Wellness Department was solely to attend to such problems and that the application of breathalyser is part of correcting the alcohol abuse problem.

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- Explained that even in a case in which an employee is caught being under the influence using the breathalyser, the employee is not going to be dismissed with immediate effect, but will be taken through some corrective steps to alleviate the behaviour.

- Defended the breathalyser being used by Pikitup by saying that the device is designed in such a way that it is safe to use without any contamination to any person using it."

[13] The objections raised by the first respondent were despite a memorandum, dated 3 November 2010, that was sent to all employees at the Head Office, by Ms Joja, wherein she explained how the breathalyser works and assured the employees that it is hygienic. She also explained why everybody that enters their building should be tested.

[14] In its replying affidavit, the appellant reiterated that the fears relating to hygiene are unfounded, because the person being tested does not even touch the device with his/her lips, because the person only blows towards it for the tester to take a reading. It also stated that an employee who incorrectly tested positive for alcohol, will be given an opportunity to have a second test and if the result remained positive, such employee can demand that a blood test be administered.

14.1 The appellant was also of the view that even if breathalysers are less accurate than blood tests, they are still a valuable first line of testing, which can profitably be used to enhance the safety of its employees and members of the public. It also presented proof that the breathalysers were calibrated and that the testers were trained to operate them.

14.2 The appellant stated that the first respondent's contention, that the tests are degrading, is absurd when members of the public and other employees were injured and killed as a result of its drivers driving under the influence of alcohol.

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[15] The first respondent and the appellant could not reach an agreement on these issues. The former referred the dispute to the CCMA on 30 April 2013 and summarised the dispute as follows:

> "The workers demand that there be no
>
> 1. Breathalyser test and
>
> 2. No Biometric time control system."

[16] As indicated above, the dispute remained unresolved as at 15 July 2013 and the certificate of outcome was endorsed to that effect. The union was of the view that its right to strike had been perfected. On 17 July 2013, it gave notice to the appellant of its intention to embark on strike action with effect from 29 July 2013.

[17] The appellant pre-empted the proposed strike and approached the Labour Court on an urgent basis seeking interim relief to interdict the strike. During those proceedings, before Snyman AJ, the union did not file an answering affidavit and argued the matter based on the appellant's founding affidavit.

[18] The issues, with regard to the breathalyser testing, were *inter alia* whether the demand for the abandonment of breathalyser testing was unlawful and whether it was an issue of mutual interest. Snyman AJ concluded that the demand for the cessation of breathalyser testing was not an unlawful demand. He was however of the view that the implementation of the breathalyser testing policy fell squarely within the operational management of the business of the employer that cannot form part and parcel of issues in dispute that would qualify for or form the subject matter of legitimate collective bargaining. He explained his conclusion as follows:

> "In fact, the very issue of the Breathalyser testing process can be used to illustrate what I am saying. If the issue of the Breathalyser test was for example coupled with a new automatic penalty such as an unpaid suspension for the day, then it would clearly have the necessary nexus to an employment issue and could form the subject matter of legitimate collective bargaining to change it. However, and in this case, the applicant has in its founding affidavit

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> stated that other than conducting Breathalyser test on the driver before handing over the keys, nothing else changes. The applicant has in fact stated that the normal and existing processes in the applicant (sic) with regard to employees being under the influence of alcohol would apply which processes is (sic) not an issue in dispute between the parties."

Snyman AJ granted the interim relief based, mainly, on the above reasoning.

[19] On the anticipated return date, Hulley AJ heard substantially the same arguments as Snyman AJ did, save that the first respondent had filed its answering affidavit and the appellant its replying affidavit when the matter was heard by the former. He discharged the interim order.

[20] His reasons for doing so were crisply that the method used to provide a safe working environment, must necessarily be a matter in respect of which employees have an interest. Secondly, that the fact that the employer proposed administering a blood test (irrespective of whether it was upon demand by the employee) as part of the new system, raised serious concerns and was a matter of interest to both employer and employee.

[21] With regard to the unlawfulness of the demand, he found that the demand was lawful. He also found that it would require substantial evidence to demonstrate that the use of breathalyser tests were the only method or only reasonably practicable method by which the applicant could discharge its obligations and that such evidence was absent in this matter.

[22] Mr Myburgh, for the appellant, argued that Hulley AJ did not resolve the factual controversy as to whether there was a legitimate proven objection to the "precautionary measure" of breathalyser testing introduced by the appellant. According to Mr Myburgh, this factual issue is important, because no alternative measure was advanced by the first respondent. Mr Myburgh therefore persisted with the arguments raised before Hulley AJ and submitted that Hulley AJ failed to deal properly with the facts. He pointed out that Hulley AJ initially found that the introduction of breathalyser testing *per se* as a method of alcohol testing does not involve a matter of mutual interest, but then went on to find that because a blood sample might ultimately be drawn

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from the employee, made it a matter of mutual interest. He further submitted that Hulley AJ was wrong in determining that the demand would only be unlawful if a breathalyser test was the only method (or reasonably practicable method) of testing for intoxication and that, if necessary, expert testimony should have been presented to establish that fact. He submitted that the strike was ultimately aimed at preventing the appellant from complying with its legal obligations in terms of the Occupational Health and Safety Act (the OHSA).[3] Any work stoppage for the aforementioned purpose would therefore be unlawful.

[23] Mr Kennedy, for the first respondent, argued that the right to strike should only be limited if the limitation is clear from the legislation or instrument seeking to limit the right. He submitted that the mere fact that a statute, the OHSA in this case, is designed to give effect to a safety and security measure, does not necessarily render the right to strike subordinate to such legislation. He further submitted that a demand by employees that an employer must bargain collectively, and agree, on a measure contemplated in the OHSA, is not unlawful.

[24] It is clear that the appellant endeavoured to limit the issues on which it had to engage in collective bargaining with its employees, by excluding health and safety matters, and thereby restricting their right to strike. It also sought to limit the employees' right to strike by arguing that their demand is an unlawful demand. Before examining these issues, it is apposite to discuss the right to engage in collective bargaining and the concomitant right to strike.

[25] The right to strike and the right to engage in collective bargaining are entrenched in the Constitution.[4] Section 23(2)(c) provides that every worker has the right to strike. Section 23(5) provides that:

> "Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to

[3] Act 85 of 1993.
[4] Constitution of the Republic of South Africa, 1996.

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regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."[5]

[26] Collective bargaining, it was said, implies a right on the part of those who engage in collective bargaining to exercise economic power against their adversaries.[6] The Constitutional Court emphasised the importance of the right to strike as follows:

> "Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lockout). The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lockout."[7]

[27] The right to strike and the right to engage in collective bargaining are interrelated. One cannot exist without the other. The right to engage in collective bargaining is strengthened by the right to strike. Collective bargaining without the concomitant right to strike will be rendered nugatory. The right to strike is constitutionally protected in order to redress the inequality in social and economic power in employer/employee relations.[8] It is also

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[5] Section 36(1) reads as follows:
"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose."

[6] *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at para [64].

[7] *In re: Certification of the Constitution of the RSA supra* at para [66].

[8] See *SATAWU and Others v Moloto* 2012 (6) SA 249 (CC) at para [61].

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important for the dignity of workers who may not be treated as coerced employees.[9]

[28] Given the historical and contemporaneous importance of the right to strike, it should not be limited or restricted by reading implicit limitations into it. In *SATAWU v Moloto* it was said that:

> "The right to strike is protected as a fundamental right in the Constitution without any express limitation. Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them, and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning."[10]

[29] An interpretation which limits the right to strike should therefore be avoided if the text that seeks to limit it is susceptible to an interpretation that upholds and protects the right to strike. In essence, any legislative provision that seeks to restrict the right to strike should do so expressly, in clear and unequivocal terms.

[30] The Labour Relations Act (LRA),[11] which is the vehicle that Parliament used to give effect to and regulate the labour rights entrenched in section 23 of the Constitution, contains limitations on the right to strike. It is uncontroversial that the LRA contains both substantive and procedural restrictions to the right to strike. Procedurally, the right to strike will not accrue if the dispute, to put it simply, was not referred to the CCMA or a Bargaining Council and a certificate of non-resolution issued and, secondly, if the union had not issued a strike notice.[12] Both procedural requirements were fulfilled in this matter.

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[9] *National Union of Metal Workers of SA and Others v Bader Bop (Pty) Ltd and Another* 2003 (3) SA 513 (CC) at para [13].

[10] At para [44].

[11] Act 66 of 1995.

[12] See section 64 of the LRA which reads:

"(1) Every employee has the right to strike and every employer has recourse to lock-out if-
 (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and-
  (i) a certificate stating that the dispute remains unresolved has been issued; or
  (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that-

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The substantive requirements set out in section 65 of the LRA are strictly speaking also not relevant for the resolution of this dispute.[13]

[31] The definition of "strike" in the LRA also restricts the right to strike. It is defined as follows:

> "'Strike' means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of

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(b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless-
   (i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
   (ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or

(c) in the case of a proposed lock-out, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or

(d) in the case of a proposed strike or lock-out where the State is the employer, at least seven days' notice of the commencement of the strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c)…"

[13] Section 65 of the LRA reads as follows:

"(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if-
   (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;
   (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;
   (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;
   (d) that person is engaged in-
      (i) an essential service; or
      (ii) a maintenance service.15

(2) (a) Despite section 65 (1) (c), a person may take part in a strike or a lock-out or in any conduct in contemplation or in furtherance of a strike or lock-out if the issue in dispute is about any matter dealt with in sections 12 to 15.16.
   (b) If the registered trade union has given notice of the proposed strike in terms of section 64 (1) in respect of an issue in dispute referred to in paragraph (a), it may not exercise the right to refer the dispute to arbitration in terms of section 21 for a period of 12 months from the date of the notice.

(3) Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out-
   (a) if that person is bound by-
      (i) any arbitration award or collective agreement that regulates the issue in dispute; or
      (ii) any determination made in terms of section 44 by the Minister that regulates the issue in dispute; or
   (b) any determination made in terms of the Wage Act and that regulates the issue in dispute, during the first year of that determination."

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> mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it was voluntary or compulsory."[14]

[32] The disputes in this matter hinge on two parts of the definition of a strike. It is clear that the cessation, retardation or obstruction of work must be for the purposes of remedying a grievance or resolving a dispute. It is also beyond cavil that the dispute or grievance must be about a matter of mutual interest. The appellant contended that the intended strike in this matter is not about a matter of mutual interest and that it is not aimed at remedying or resolving a lawful dispute or grievance. I turn to deal with the last mentioned issue first.

[33] This Court said that industrial action for the purpose of requiring or compelling an employer to perform an unlawful act cannot be protected.[15] Therefore the cessation, retardation or obstruction of work must be aimed at remedying a lawful grievance or resolving a lawful dispute. Both parties accepted this to be the legal position.

[34] Mr Myburgh submitted that the first respondent's proposed industrial action is essentially geared at forcing the appellant to commit a crime in terms of the OHSA. He contended that the OHSA places onerous duties and responsibilities on the appellant, which it has to comply with on pain of criminal sanction. Both Snyman AJ and Hulley AJ rejected this argument. Was the rejection justified?

[35] Section 8 of the OHSA reads as follows:

> "**8 General duties of employers to their employees**
>
> (1) Every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees.
>
> (2) Without derogating from the generality of an employer's duties under subsection (1), the matters to which those duties refer include in particular-

[14] See section 213 of the LRA.

[15] *TSI Holdings (Pty) ltd and Others v National Union of Metalworkers of South Africa and Others* (2006) 27 ILJ 1483 (LAC) at para [48].

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(a) the provisions and maintenance of systems of work, plant and machinery that, as far as is reasonably practicable, are safe and without risks to health;

(b) taking such steps as may be reasonably practicable to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to personal protective equipment;

(c) making arrangements for ensuring, as far as is reasonably practicable, the safety and absence of risks to health in connection with the production, processing, use, handling, storage or transport of articles or substances;

(d) establishing, as far as is reasonably practicable, what hazards to the health or safety of persons are attached to any work which is performed, any article or substance which is produced, processed, used, handled, stored or transported and any plant or machinery which is used in his business, and he shall, as far as is reasonably practicable, further establish what precautionary measures should be taken with respect to such work, article, substance, plant or machinery in order to protect the health and safety of persons, and he shall provide the necessary means to apply such precautionary measures;

(e) providing such information, instructions, training and supervision as may be necessary to ensure, as far as is reasonably practicable, the health and safety at work of his employees;

(f) as far as is reasonably practicable, not permitting any employee to do any work or to produce, process, use, handle, store or transport any article or substance or to operate any plant or machinery, unless the precautionary measures contemplated in paragraphs *(b)* and *(d)*, or any other precautionary measures which may be prescribed, have been taken;

(g) taking all necessary measures to ensure that the requirements of this Act are complied with by every person in his employment or on premises under his control where plant or machinery is used;

(h) enforcing such measures as may be necessary in the interest of health and safety;

(i) ensuring that work is performed and that plant or machinery is used under the general supervision of a person trained to understand the hazards

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associated with it and who have the authority to ensure that precautionary measures taken by the employer are implemented; and

(j) causing all employees to be informed regarding the scope of their authority as contemplated in section 37(1) *(b)*."

[36] Section 9 of the OHSA reads as follows:

9. General duties of employers and self-employed persons to persons other than their employees

(1) Every employer shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health or safety.

(2) Every self-employed person shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that he and other persons who may be directly affected by his activities are not thereby exposed to hazards to their health or safety."

[37] Section 14 places duties on employees at work and reads as follows:

"Every employee shall at work-

(a) take reasonable care for the health and safety of himself and of other persons who may be affected by his acts omissions;

(b) as regards any duty or requirement imposed on his employer or any other person by this Act, co-operate with such employer or person to enable that duty or requirement to be performed or complied with;

(c) carry out any lawful order given to him, and obey the health and safety rules and procedures laid down by his employer or by anyone authorized thereto by his employer, in the interest of health or safety;

(d) if any situation which is unsafe or unhealthy comes to his attention, as soon as practicable report such situation to his employer or to the health and safety representative of his workplace or section thereof, as the case may be, who shall report it to the employer; and

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(e) if he is involved in any incident which may affect his health or which has caused an injury to himself, report such incident to his employer or to anyone authorized thereto by the employer, or to his health and safety representative, as soon as practicable but not later than the end of the particular shift during which the incident occurred, unless the circumstances were such that the reporting of the incident was not possible, in which case he shall report the incident as soon as practicable thereafter."

[38] Regulation 2A of the regulations promulgated under the Machinery and Occupational Safety Act[16] provides that an employer shall not permit any person who is or who appears to be under the influence of intoxicating liquor or drugs, to enter or remain at a workplace.

[39] In terms of section 38 of the OHSA, any person who contravenes or fails to comply with the provisions of sections 8, 9, 14 is guilty of an offence and shall on conviction be liable to be sentenced to a fine not exceeding R50 000.00 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

40] Section 8 of the OHSA places a duty on the appellant to maintain as far as is reasonably practicable a working environment that is safe and without health risks for its employees. Section 9 places a duty on the appellant to conduct its business in such a manner as to ensure as far as reasonably practicable that persons who are not its employees who may be directly affected by its activities are not thereby exposed to health or safety hazards.

[41] Reasonably practicable means practicable having regard to:

(a) the severity and scope of the hazard or risk concerned;

(b) the state of knowledge reasonably available concerning that hazard or risk and of any means of removing or mitigating that hazard or risk;

(c) the availability and suitability of means to remove or mitigate that hazard or risk; and

[16] Act 6 of 1983. Regulations published in Government Notice R1031 in Government Gazette 10252 of 30 May 1986. Regulation 2A inserted by GNR928 of 25 June 2003.

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(d) the cost of removing or mitigating that hazard or risk in relation to the benefits deriving therefrom.[17]

[42] Sections 8 and 9 therefore place a duty on the employer to act proactively to avoid any harm or injury to its employees and others. There is no standard as to what is reasonably practicable. Each case will have to be determined on its own facts and circumstances. As can be seen from the definition of reasonably practicable it involves weighing different considerations from risk evaluation, means of removing or avoiding the risk, resource availability and a cost-benefit analysis. In *Edwards v National Coal Board*, Lord Justice Asquith stated:

> "Reasonably practicable as traditionally interpreted, is a narrower term than 'physically possible' and implies that a computation must be made in which the quantum of risk is placed in one scale and the sacrifice, whether in money, time or trouble involved in the measure necessary to avert the risk is placed in the other; and that, if it is shown that there is a gross disproportion between them, the risk being insignificant in relation to the sacrifice, the person upon who the duty is laid discharges the burden of proving that compliance was not reasonably practicable. This computation falls to be made at a point of time anterior to the happening of the incident complained of."[18]

[43] Mr Myburgh argued that the appellant has made an assessment and concluded that the reasonably practicable way to fulfil its obligations and comply with its duty is by subjecting its drivers to mandatory breathalyser testing. The appellant considered the breathalyser as an effective precautionary measure as compared to mere physical observation. He further contended that the breathalyser testing policy assists the employees because they are obliged to take reasonable care of their own health and safety and that of other persons who may be affected by their conduct. He correctly submitted that all employees are obliged to:

[17] See section 1 of the OHSA.
[18] [1949] 1 ALL ER 743 CA.

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(i) cooperate with their employer in order to enable it to acquit itself of its duties under the OHSA;

(ii) carry out lawful health and safety orders; and

(iii) comply with health and safety rules and procedures.

A refusal by the employees, so the argument went, to undergo breathalyser testing would be in breach of all three the abovementioned statutory duties, because it would involve a failure to cooperate and disobedience with a health and safety order, rule or procedure.

[44] Mr Kennedy submitted that the appellant's arguments are flawed, because it sought to subordinate the right to strike to the provisions of the OHSA in circumstances where the OHSA does not contain any express intention to limit the right to strike. He contended that the demand of the employees properly construed, did not mean that they wanted no testing measures at all. He further submitted that the OHSA, by using reasonableness as a touchstone, adopted a variable standard which meant that both employers and employees are permitted to negotiate over the most effective means to implement the measures contained in the OHSA.

[45] Before attending to the issue of the lawfulness or otherwise of the demand, I propose to deal briefly with what Mr Myburgh styled as the factual controversy that went undetermined, by Hulley AJ. In my view, there is no controversy at all. The facts are that the first respondent objected to the introduction of breathalyser testing, at the meeting of 8 December 2010, and stated that it is unhygienic, inaccurate and degrading. At that meeting, the appellant only addressed the hygiene issue. Likewise of the three issues of concern to the first respondent only the hygiene issue was addressed by Ms Joja in her memorandum dated 3 November 2010. The issues relating to the accuracy of the breathalyser devices and the fact that testing is degrading to the persons being tested were only addressed in the replying affidavit. The issue with regard to the reliability of the device was also not proved. The concern that breathalyser testing was degrading, was dismissively and contemptuously, without proper consideration rejected, by the appellant.

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[46] I accept that the appellant has done a risk assessment and concluded that it is reasonably practicable to ensure the safety of its employees and the public by introducing breathalyser testing. The subsequent implementation was done without properly engaging the first respondent. The employees demanded that "there be no breathalyser test". They did not propose an alternative. Their reticence does not, in my view, mean that the employer may unilaterally impose breathalyser testing.

[47] It is our duty to look at the true nature of the dispute and not the manner in which it has been packaged by the employees. In *NUMSA v Bader Bop* it was stated that:

> "It is the duty of a court to ascertain the true nature of the dispute between the parties. In ascertaining the real dispute a court must look at the substance of the dispute and not at the form in which it is presented. The label given to a dispute by a party is not necessarily conclusive. The true nature of the dispute must be distilled from the history of the dispute, as reflected in the communications between the parties and between the parties and the Commission for Conciliation, Mediation and Arbitration (CCMA), before and after referral of such dispute. These would include referral documents, the certificate of outcome and all relevant communications."[19]

[48] The dispute properly considered, is not a demand that the appellant should not have any policy or practice in place to detect whether employees, or drivers specifically, are under the influence of alcohol. They had specific problems with the breathalyser device. The appellant had an alcohol/substance abuse policy in place before it decided to introduce breathalyser testing. Its original policy did not include any form of pre-incident mandatory testing.

[49] It is not in dispute that breathalyser testing is but one of a range of measures that can be used to detect alcohol consumption; observation, urine test, blood test and the stroop test – are some of the other methods that can be used.[20]

[19] Ibid at para [52].
[20] See McCann *et al*: Alcohol Drugs and Employment, Second Ed, Juta Chapter 10.

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[50] The employees complained that there were instances where the breathalyser produced inaccurate and unreliable results. The appellant stated in its replying affidavit that to the extent that the breathalyser gives an incorrect result, the employee will be given an opportunity to have a second test and, if the result is still positive, such employee can demand that a blood test be administered. It further stated that even if the breathalyser is less accurate than blood tests, which appears to be unknown to either of the parties, it is still a valuable first line of testing which can profitably be used to enhance the safety of the employees and members of the public.

[51] The appellant's evidence relating to the reliability of the breathalyser is equivocal. The employees raised a genuine concern relating to the reliability of the breathalyser. Although the first respondent does not say what should replace breathalyser testing it is clear that in the absence of breathalyser testing there are other lawful means of testing for alcohol consumption be it observation, blood tests, urine tests or any other reasonably practicable means. On the facts of this matter it cannot be said that the breathalyser was the only reasonably practicable way to ensure the safety of the employees and others.

[52] Reasonably practicable is a variable standard that must be determined objectively. The employer and to a lesser extent the employee as the duty holders (in terms of sections 8, 9 and 14 of the OHSA) must do a risk assessment and consider what can or should be done under the circumstances, considering their knowledge of the situation to ensure the health and safety of employees, co-workers and others who might be put in harm's way, because of their activities. They must then consider, given the circumstances, whether it is reasonable to do all that is possible to comply with their duty. In essence, this means that what can be done, should be done, unless it is reasonable in the circumstances to do something less, or in extreme circumstances, more.

[53] The appellant, as stated above, had an alcohol and substance abuse policy in place before deciding on breathalyser testing. Does it mean that it operated in contravention of sections 8 and 9 of the OHSA before it introduced

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breathalyser testing? The answer is no. The absence of breathalyser testing surely did not mean that the appellant contravened the provisions of the OHSA. Mandatory breathalyser testing for all drivers or employees is also not a requirement of the OHSA. A policy that an employee will be tested for alcohol consumption where there are reasonable grounds to believe that he/she had consumed alcohol whilst on duty, can be reasonably practicable. Moreover the demand that "there be no breathalyser test" may mean that the union is of the view that the measure introduced by the appellant to avoid the risk is disproportionate to the risk, i.e. that the risk is so small that the preventative measure is not necessary. The union can be convinced otherwise at the bargaining table. The demand was justified and would not necessarily result in a crime being committed by the appellant. I therefore agree with Snyman and Hulley AJJ. I now turn to consider whether the dispute was a matter of mutual interest.

[54] I agree with Hulley AJ that the phrase any matter of mutual interest defies precise definition. The phrase is couched in very wide terms. According to Grogan, the phrase is extremely wide, "potentially encompassing issues of employment in general, not merely matters pertaining to wages and conditions of service".[21]

[55] *In Rand Tyres & Accessories v Industrial Council for the Motor Industry (Transvaal)* the following was said about the phrase:

> "Whatever can reasonably and fairly be regarded as calculated to promote the well-being of the trade concerned, must be of mutual interest to them; and there can be no justification for restricting in any way powers which the Legislature has been at the greatest pains to frame in the widest possible language."[22]

[56] Grogan concludes, correctly in my view, that "the best one can say, therefore, is that any matter which affects employees in the workplace, however,

[21] John Grogan: Collective Labour Law Juta 2007 at 134.
[22] 1941 TPD 108 at 115.

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indirectly, falls within the scope of the phrase 'matters of mutual interest' and may accordingly form the subject matter of strike action."[23]

[57] The phrase mutual interest seeks to limit the issues that may form the subject matter of a strike. It can therefore not be without boundary. The matter should not be too far removed from the employment relationship so that it can properly be said that it does not concern the employment relationship. Matters that are purely socio-economic or political would generally not be matters of mutual interest. If employees were to be allowed to strike over any political or socio-economic issues, uncertainty will reign and the employer will in most cases be confronted with a situation over which he/she has no control or influence. Many disputes however have, at bottom, political and/or socio-economic issues. The facts of each matter will determine whether such issue is one of mutual interest.[24]

[58] Although ensuring the health and safety of employees and others is predominantly the employer's responsibility, it is clear from the OHSA that the employee also bears duties and responsibilities towards other employees and members of the public. The employer may not always have all the solutions to health and safety issues at the workplace. The employees on the other hand may have the necessary knowledge and experience of a risk, how it affects or may affect them and or others and how to avoid it. The term reasonably practicable which is the touchstone in the OHSA also demands that various interests be considered as well as a cost-benefit analysis to be done. The whole scheme of the OHSA points to a need for employers and employees to work together, in order to ensure the health and safety of everybody. Employers might consider the minimum that can be done in order to satisfy the reasonably practicable requirement whilst employees, who are at the coalface, might want more to be done.

[59] It is counter-intuitive to say that an employee has no interest in his/her own health and safety. The giving of a breath sample might be less invasive than

[23] Ibid at 134.
[24] A useful discussion of the cases and an article in which the phrase was defined is contained in *SADTU v Minister of Education and Others* (2001) 22 ILJ 2325 (LC) at para [43].

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giving a blood sample, but it is still invasive. It represents an inroad into the employee's right to privacy. The worker is coerced to give a sample in circumstances where his/her consent was not sought before the decision to subject him/her to breathalyser testing was taken.

[60] On the appellant's arguments the employer may unilaterally, by virtue of its managerial prerogative, set unreasonable health and safety rules and policies, under the guise of it being reasonably practicable measures, and the employees will have to obey without demur. On the other hand, the employer may determine that it is reasonably practicable to implement a measure whereas the employees might be of the view that the proposed measure does not give them adequate protection. The employees would, on the appellant's argument, not have a right to engage in collective bargaining with the employer for the best possible protection. This would in my view be against the general purpose of the OHSA.

[61] The employees' complaint that breathalyser testing is degrading, was answered as follows in the replying affidavit:

> "The allegation that the tests are degrading is, with respect, absurd. It has been shown comprehensively above that employees do attend at work under the influence of alcohol and that this is extremely dangerous. There can be no reason whatsoever why employees should feel that it is degrading for drivers to be tested when other employees and members of the public have lost their lives and, in one instance referred to above, been permanently disabled, as a result of a driver driving whilst under the influence of alcohol. The respondents should welcome this initiative as it can only be to their benefit…"

[62] It is correct that the appellant did show that some of its employees reported for duty or drove its vehicles whilst they were under the influence of alcohol. The evidence did not indicate that the problem of driving under the influence is so pervasive that breathalyser testing had to be implemented without having regard to the rights of employees or without negotiating with the first respondent. The appellant only referred us to four vehicle collisions for the period 2008 – 2013 where the drivers were under the influence of alcohol.

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During the pilot phase of the breathalyser testing, October 2010 to December 2010, none of the drivers tested positive for alcohol consumption.

[63] There is no indication that proper consideration was given to the right to privacy of the employees. In *Communications, Energy and Paperworkers Union of Canada v Irving Pulp & Paper, Limited* the Supreme Court of Canada said the following:

> "49 On the other side of the balance was the employee right to privacy. The board accepted that breathalyser testing 'effects a significant inroad' on private 'involving coercion and restriction on movement. Upon pain of significant punishment, the employee must go promptly to the breathalyser station and must co-operate in the provision of breath samples… Taking its results together, the scheme effects a loss of liberty and personal autonomy. These are at the heart of the right ot privacy."
>
> 50 That conclusion is unassailable. Early in the life of the Canadian Charter of Rights and Freedoms, this Court recognized that 'the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity…" And in **R v Shoker** 2006 SCC 44, [2006] 2 S.C.R. 399 it notably drew no distinction between drug and alcohol testing by urine, blood or breath sample concluding that the "seizure of bodily samples is highly intrusive…"

I can think of no reason why the position should be different here. The rights to human dignity, privacy, freedom of movement and bodily integrity are entrenched in our Constitution.[25] In my view, an employee's consent is required before such an invasive and intrusive act can be required from him/her.

[64] The OHSA is underpinned by co-operation between employer and employees. It should be viewed through the prism of shared duties and responsibilities which can in most cases only be achieved if the employees consent and buy-in to the measures. It does not exclude collective bargaining.

[25] See sections 10, 12(2), 14 and 21(1) of the Constitution of the Republic of South Africa, 1996.

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[65] The provisions of the OHSA are compatible with collective bargaining. As stated above, the Act is underpinned by mutual cooperation between employer and employees. Such cooperation can be achieved by way of collective bargaining and in cases where no agreement is reached, by using the weapons available to the bargaining parties. It is telling that Ms Joja was mandated by EXCO to negotiate with the first respondent. Such negotiations could only have been aimed at reaching an agreement on the breathalyser testing. It is strange that when the negotiations failed the appellant then changed tack and alleged that it had no duty to engage in collective bargaining with the first respondent.

[66] I therefore agree with Hulley AJ that the health and safety issues in this matter are matters of mutual interest. In my view, Snyman AJ’s judgment unjustifiably limits the phrase matters of mutual interest to terms and conditions of employment only. In any event, the fact that an employee would work in a safe and healthy environment and the parties’ (employer and employee) duties thereanent is at least an implied term of a contract of employment. Snyman AJ found that nothing changed except that the employee had to give a breath sample before receiving the keys to a truck. This is an over simplification of the situation. The Constitutional rights of the employees where infringed without their consent. In my view, that represents a substantial change.

[67] In my judgment, health and safety issues are primarily the responsibility of the employer but they are matters of mutual interest over which the parties may engage in collective bargaining and if they cannot agree, the employees may embark on strike action in order to resolve the dispute.

[68] There is no reason in law or equity why the costs should not follow the result in this matter. Both parties employed two counsel. The matter was sufficiently complex to warrant the employment of two counsel on both sides.

[69] I accordingly make the following order:

The appeal is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.

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C.J. Musi, AJA

Tlaletsi ADJP and Mokgoatlheng AJA concur in the Judgment of Musi AJA

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