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Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C 609/2008

In the matter between:

DEPARTMENT OF COMMUNITY SAFETY: WESTERN CAPE PROVINCIAL GOVERNMENT	Applicant
and	
THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	First Respondent
PANELLIST PATRICK SAMUEL N.O.	Second Respondent
THE PUBLIC AND ALLIED WORKERS UNION OF SOUTH AFRICA OBO STRYDOM & OTHERS	Third Respondent

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JUDGMENT

STEENKAMP J:

INTRODUCTION

1. This application concerns the application and interpretation of various collective agreements in the public sector, and the collective bargaining regime in the public sector in general. It also impacts on

law enforcement by traffic officers in the Western Cape over weekends and after 22:00 at night.

2. The background to the dispute is a change in the working hours of traffic officers in the Western Cape from five days a week (and only from 06:00 to 14:00) to a shift system designed to ensure traffic law enforcement seven days a week, 24 hours per day.

3. The award sought to be reviewed holds that the employer failed to follow the correct collective bargaining procedure in changing from a five day to a seven day work week. The evidence led at the arbitration largely concerned itself with how the (confusing) collective bargaining regime was supposed to operate.

4. As Mr *Kahanovitz*, for the applicant, pointed out in argument, the focus on the collective regime arose in consequence of a legally flawed assumption that the working hours regime could only be changed if a collective agreement was concluded. Unless this premise was correct subsidiary questions relating to how, where and with whom negotiations and/or consultation should be conducted were irrelevant.

5. The application for review was initially opposed but, at the time of hearing, it was no longer opposed. The parties agreed that, should the third respondent (PAWUSA) withdraw its opposition, the applicant would no longer seek an order as to costs.

6. The award sought to be reviewed dates from 22 July 2008, following an arbitration heard under the auspices of the first respondent (the GPSSBC) on 8 April and 26 May 2008. This application was only heard on 29 September 2010. The review has been plagued with procedural delays caused largely by a missing tape recording. The parties eventually agreed that what was on that tape was not relevant to this review. In this regard, parties in review proceedings generally would do well to keep in mind the provisions of rules 7A(5) and 7A(6), that specify that only the *portions of the record as may be necessary for the purposes of the review* need be filed. [1]

INCOMPLETE RECORDS – THE LAW

7. Where an applicant on review is presented with an imperfect record he must endeavour to establish whether the missing part of the record is irretrievably lost.

8. If part of a record is irretrievably lost then the parties and the commissioner must attempt to reconstruct the missing part. [2]

[1] The Judge-President of this court recently reiterated, in a Consolidated Practice Directive issued on 15 September 2010, that "parties are reminded that rule 7A requires an applicant in a review application to copy, serve and file only those portions of a record that are necessary for the purposes of a review. The filing of unnecessary portions of a record is a factor that may be taken into account for the purposes of any order of costs."
[2] *Papane v Van Aarde N.O. & Others* (2007) 28 *ILJ* 2561 (LAC).

9. In appropriate and exceptional cases the court can determine the review on an incomplete record if the court is satisfied that the central issue can justly be resolved on the material before it.[3]

10. On 12 December 2008 the state attorney (the applicant's legal representative) sent a letter to the third respondent (PAWUSA) regarding the state of the record filed with the registrar by the first respondent (the Bargaining Council). The crux was that although part of the record was missing the arbitrator (the second respondent) had found that he had not needed to analyse the evidence of the witnesses as the award rested on an interpretation of a collective agreement. In the circumstances it was suggested (and subsequently agreed) that the review could proceed on the record as it stood as the missing portion was irrelevant.

11. I am satisfied that the court can determine this review on an incomplete record. The central issue can justly be resolved on the material before me. And remitting the matter due to an incomplete record would be pointless as the issue can be decided on point of law.

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[3] (*Papane, supra*). A useful review of the case law dealing with incomplete records is set out in *Doornpoort Kwik Spar CC v Odendaal & Others* (2008) 29 *ILJ* 1019 (LC)

CONDONATION

12. The founding papers in the review application, although deposed to timeously, were filed two days late due to an administrative oversight in the office of the State attorney. The applicant sought condonation.

13. There was also a considerable delay in the filing of the supplementary founding affidavit arising out of the problems with the incomplete record, endeavours to settle the entire case and the subsequent process to reach agreement on what steps, if any, should be taken to remedy the situation of a defective record. I accept that there is a good explanation for the delays. This is coupled with good prospects of success, as will be apparent from the reasons for my finding on the merits. Taking into account the well-known principles set out in *Melane v Santam Insurance Ltd*[4] the non-compliance with the time periods set out in the rules is condoned.

[4] 1962 (4) SA 531 (A) 532

BACKGROUND

14. On 21 January 2008 the third respondent (PAWUSA) submitted a referral form referring a dispute to be conciliated by the first respondent (the Bargaining Council). Significant features of that referral document are as follows:

14.1 It was alleged that the dispute arose on 13 December 2007.[5]

14.2 After summarising the facts of the dispute being referred, the referral form stated the following:

> *"Department fails to comply with the rules and regulation of the General Public Sector Bargaining Council and/or Provincial Bargaining Chamber of the Western Cape.*
>
> *Unilateral change our members condition of services."*

(The incorrect grammar is in the original).

14.3 The outcome required by the union was as follows:

[5] The referral date was one of the third respondent's choosing and is unrelated to the chronological sequence of events. See below.

> *"That the department revert back to their original condition of service as stated in the PAS and/or negotiate with the union to change any conditions of service."*

(Again, the incorrect grammar is as in the original).

15. After conciliation had failed, PAWUSA submitted a request for arbitration on 13 February 2008.

16. The dispute was as a result of a change to the shift system applicable to Provincial Traffic personnel employed by the applicant. The change was implemented in February 2006. The third respondent waited until 2008 to challenge the alleged breach of the collective agreement.

17. To understand this dispute in its proper context it is however necessary to provide a chronology of the significant events.

18. Prior to 2006 Provincial Traffic personnel employed by the applicant worked a 5-day work week. A work day consisted of two 8 hour shifts, the first of which ran from 06:00 to 14:00, and the second from 14:00 to 22:00. The traffic officers worked 40 hours per week from Monday to

Friday and were paid overtime or given time off for hours worked in excess of 40 hours per week or for work performed on weekends.

19. The employer perceived a need to implement a 7-day work week with Provincial Traffic Officers on duty for 24 hours per day for a 7-day week. The need for this change was driven by the number of fatalities on provincial roads which required a 24 hours presence of law enforcement officers. In particular there were a high number of fatalities on weekends and this meant that if the department wanted to reduce fatalities it was essential for there to be an increased presence of traffic officials on the road during weekends. (It is hardly surprising that many drivers are apparently more inclined to drive recklessly over weekends and late at night. For the sake of argument in this matter, I accept the applicant's assurance that the increased presence of traffic officers would be used for active law enforcement and not for passive cash generation through the use of speed traps on dual lane or multi-lane highways).

20. There was initially some resistance from employees to the implementation of these changes. Some employees had become used to being paid for working overtime on a semi-permanent basis.

21. For the department this system was unworkable. In the first place, the department was incurring unaffordable overtime expenses of in the excess of R4.5 million per annum. In the second place, employees were being required to work excessive hours. It therefore made sense to introduce a 7-day work week with three 8 hour shifts per day and to hire additional traffic officers - insofar as this would be required - in order for this service to be delivered to the public.

22. The further operational requirements and considerations which gave rise to the change are set out in a document which was drawn up and circulated among senior management of the Department who had to provide input in respect of the suggested change.[6]

23. As already stated, the previous practice had been that the official working hours were Monday to Friday only with the first shift working from 06:00 to 14:00 and the second shift working from 14:00 to 22:00. The system was impractical and insufficiently catered for road safety as there was no structured roster for the presence of provincial traffic officers on our roads on weekends and after 22:00 at night. It was

[6] The document is headed, *Provincial Traffic Service: Implementation of a 7-day workweek.*

obvious that there had to be traffic officers on the roads at these times. What had happened in the past was that a dysfunctional system had evolved whereby existing traffic officers were deployed to perform these duties outside of what – at that time – were regarded as normal working hours.

PROCEDURES FOLLOWED TO BRING ABOUT THE CHANGES

24. Provincial traffic officers do not have any contractual right to choose their shifts. Traffic officers are appointed by way of a letter of appointment stipulating no fixed hours.

25. The procedure for determining working hours is set out in the Public Service Regulations, 2001 ("the regulations"). Part VI of chapter 1 deals with the "Working Environment". Under the heading "Principles" the regulations provide that the working environment should support effective and efficient service delivery. Sub-heading "B" under the heading "Working Hours" states as follows:

"A head of department shall determine –

a). The work week and daily hours of work for employees; and

b). The opening and closing times of places of work under her or his control, taking into account

i). the needs of the public in the context of the department's service delivery improvement program; and

ii). the needs and circumstances of employees, including family obligations and transport arrangements".

26. Sub-heading "C" of the Regulations goes on to provide that a head of department may require an employee to perform work outside of normal working hours if the work must be performed without delay owing to circumstances which are beyond the control of the head of department.

27. At the time that the employer sought to implement a 7-day work week it was under the impression that it was obliged in law to consult with the trade unions before so doing. The applicant was subsequently advised that, although engaging in such consultations was no doubt a good labour relations practice, there was no legal obligation on the department to negotiate or consult with trade unions or their members

about these changes as no contractual rights of any existing employees were to be altered as a consequence of the proposed changes.

28. In any event, such consultation did occur. The third respondent (PAWUSA) was not a party to these consultations for the simple reason that it had no members in the Department at that time. Consultations were held with the following unions:

    28.1 NEHAWU

    28.2 HOSPERSA

    28.3 PSA

    28.4 POPCRU.

29. A number of meetings were held which were canvassed in the evidence. An example of one such meeting is one that took place on 2 November 2005.[7] As appears from that minute the employer's view at the time was that it was under an obligation to consult under the Code

[7] The minute of the meeting was annexed to the pleadings.

of Good Practice on the Arrangement of Working Time issued under the Basic Conditions of Employment Act.[8]

30. After extensive consultations the Minister of Community Safety in a position paper published in October 2006 set out the employer's position on the implementation of a 7-day work week. In that document it is stated that the department has the in principle agreement of organised labour that there is no option but to implement a 7-day work week.

31. The consultation process with the trade unions referred to above was successful, in that all of them indicated that they supported the proposed new shift system. The third respondent, PAWUSA, was not a party to that process as it did not at the time represent any of the employees affected by the proposed shift change. According to the applicant, it was accordingly with some surprise that it was confronted - some years after the event - with a challenge brought by the third

[8] Clause 4.1 of the Code provides that the design of shift rosters must be sensitive to the impact of these rosters on employees and their families. This information can be obtained during consultations, negotiations or by circulating individual questionnaires to employees. The wording suggests that an employer should obviously be sensitive to family responsibilities and health and safety of employees in designing shift systems. Clause 5.1 stresses that in arranged shifts overtime should be avoided especially in occupations involving special hazards or heavy physical or mental strain.

respondent claiming that the applicant was required to negotiate with it prior to implementing the 7-day work week.

32. In December 2005 the applicant issued a memorandum stating that after long discussions between the employer and labour organisations at the "multilateral forum" a decision had been reached to implement a 7-day work week at all the traffic centres. The memo stated that from 1 February 2006 all provisional traffic centres would implement a 7-day work week with 8 hour shifts over a period of 24 hours. It was noted that all traffic centres would still implement the "standby principle" because of the shortage of staff members.

33. An organisational rights agreement (hereinafter referred to as the "*ORA*") had been concluded in April 2002 between the Western Cape Provincial Administration[9], DENOSA, HOSPERSA, NEHAWU, NUPSAW, PAWUSA and the PSA. That agreement provided for a body known as the Institutional Management and Labour Committee ("IMLC") and for a related body known as the Multilateral Labour Forum ("MLF"). Clause 7.72 of the ORA provides that consultations or negotiations about collective issues that could impact on the members

[9] As it was then known – now the Provincial Government of the Western Cape

of more than one union, may take place at the level of the IMLC or the MLF.

34. The consultations referred to above were held at MLF level, as envisaged in clause 7 of the ORA. Applicant has throughout contended that it was perfectly permissible for it to hold such consultations with the representative trade unions in that forum and that it was giving effect to the intention of the parties as embodied in the ORA.

35. In order to now give effect to the 7-day working week process which had been implemented, the applicant engaged in a recruitment drive. This led to the employment of a number of new traffic officers. The relevant figures are as follows:

35.1 In 2006, 92 new officers were employed at a total personnel expenditure of R8.2 million as a direct result of, and in order to give effect to, the new shift system.

35.2 In 2007, 67 new officers were employed at a total personnel expenditure of R8.46 million as a direct result of, and in order to give effect to, the new shift system.

35.3 In 2008, 111 new officers were employed at a total personnel expenditure of R11.8 million as a direct result of, and in order to give effect to, the new shift system.

36. The plan was to expand the number of traffic officers by approximately 100 further officers per annum in 2009 and 2010 resulting in an additional expenditure of approximately R11.6 million per annum.

37. What the third respondent now, belatedly, sought to have set aside is a system which was implemented some years ago which had already led to the employment of 172 new traffic officers (at the time when the award was made). Were the change to the working week to be reversed in order to restore its *status quo*, the applicant says, there is every possibility that the applicant will be required to retrench these 170 traffic officers. Strangely enough a number of the persons on whose behalf the union claims to have referred this dispute are people who were employed only because the new 7-day system was implemented.

38. The current staff complement in the Department is 873. The third respondent has no official representation whatsoever on the bargaining council - where it now claims that these terms and conditions of employment should have and must now be negotiated - because in the overall scheme of the public service it is too small to meet the threshold for representation on the bargaining council.

THE COLLECTIVE BARGAINING FRAMEWORK

39. The Public Service Co-ordinating Bargaining Council (PSCBC) is, in terms of Section 37 of the Labour Relations Act[10] ("*the LRA"*) empowered by resolution to designate sectors of the public service for the establishment of bargaining councils.

40. Acting in terms of Section 37 of the LRA, the PSCBC disestablished all provincial and departmental bargaining councils in the public service, established provincial chambers of the PSCBC and laid down guidelines for the establishment of sectoral bargaining councils. These decisions were embodied in Resolution 3 of 2004 which took effect on

[10] Act 66 of 1995

22 April 2004. One of the sectoral bargaining councils thus established was the General Public Service Sectoral Bargaining Council (the "*GPSSBC*"), the first respondent in this application.

41. The composition and functions of the provincial chambers of the PSCBC are set out in Annexure "A" to Resolution 9 of 2003. The functions of each of the provincial chambers of the PSCBC thus established are set out in clause 4 of Annexure "A" to Resolution 9 of 2003. They include the power to "*negotiate collective agreements within its area of jurisdiction and conclude such agreement subject to the provisions of paragraph 12 of this procedure*".

42. Clause 12 of the aforesaid Annexure "A" requires that any decision of a provincial chamber of the PSCBC must be submitted to the council of the PSCBC, for consultation and ratification. Any decision or resolution of a chamber shall not take effect for a period of 30 days after referral of the decision to the PSCBC for consideration and ratification.

43. Clause 16 of the aforesaid Annexure "A" stipulates that collective agreements of a "transversal nature" concluded in any existing

provincial bargaining council or similar forum remain in force until repealed or amended by a provincial chamber of the PSCBC.

44. The GPSSBC established its own provincial and national departmental chambers in terms of Resolution 3 of 2004. That resolution also abolished all current equivalent bargaining structures with effect from 30 June 2004. The powers of the departmental chambers of the GPSSBC are set out in Annexure "A" to Resolution 3 of 2004 and they include provisions regarding the negotiation of collective agreements and the ratification thereof.

45. As explained above, an organisational rights agreement ("ORA") was concluded in April 2004 between the Western Cape Provincial Administration and DENOSA, HOSPERSA, NEHAWU, NUPSAW, PAWUSA and the PSA. The ORA *inter alia* provides for the holding of multilateral meetings at head office level to discuss matters of mutual interest where, at head office level, no Institutional Management and Labour Committee exist.

THIRD RESPONDENT'S ARGUMENT AT THE ARBITRATION

46. Third respondent's submissions are summarised in the written argument presented by them to the arbitrator. For the sake of convenience I quote *verbatim* from the relevant passages:[11]

> *"**APPLICANT'S ARGUMENT***
>
> *In the applicant's bundle, Annex 2: Provincial Traffic Service: Implementation of a 7-day workweek: Employer Position Paper. The respondents state that 'the existing five day work week must be extended to a 7 day week and traffic officers must be declared shift workers.*
>
> *In terms of this document signed, only by the respondent. Respondent proceeded to change the workweek of Strydom & others from a five day workweek to a 7 day workweek and declared them shift workers without consulting or reaching agreement or the approval of Strydom & others or their trade union representative.*
>
> *A purposive interpretation of the Resolution 3 of 2004 as endorsed by the Constitution Court requires one to identify the actual purpose of the provision to be interpreted and or applied.*
> *The intention of sections 35 and 37 of the Act and the purpose of the PSCBC Sectoral Council's chambers, as per Resolution 3 of 2004 of the GPSSBC and Resolution 9 of 2003 of the PSCBC, is to provide the forum for collective bargaining around issues of mutual issues in the public sector; and*

[11] PAWUSA (the third respondent in this a review application) was the applicant at arbitration. The Department of Community Safety (applicant in this application) was the respondent at arbitration.

Given the fact that Resolution 3 of 2004 of the GPSSBC dissolves all other bargaining forums that existed within the jurisdiction of the GPSSBC, it would follow that the intention of the parties is that the GPSSBC and its chambers would be the (only) forum for collective bargaining within the scope of the GPSSBC; and

Given the need for ratification of collective agreements by council; and

(which is for purposes of alignment with the provisions of the Labour Relations Act and other relevant prescripts) with regard to changes to conditions of employment and the requirement for employers to negotiate same with recognised trade unions, it is our submission that Respondent should have referred the proposed changes to the conditions of employment of Strydom & Others to the relevant GPSSBC Provincial chamber for negotiations even if they claim to have consulted with the Unions at a provincial level.

That the affidavit of Mr. Fraser Strydom confirms al changes made in respect of changes to the relevant conditions of service and it is our argument that all these changes made are not legal and enforceable due to the respondents failure to comply with the provisions of the said agreements.

It is our belief that the conduct of employer is vexatious and frivolous and thus kindly take note that we will argue for the respondent to bear our costs in our closing arguments."

THE ARBITRATOR'S AWARD

47. The arbitrator held that the dispute concerns the interpretation application of a collective agreement.

48. The third respondent union had argued that, because the changes to the shift system would result in a change to the terms and conditions of employment of its members, the applicant had been required to do the following:

    48.1 To negotiate a collective agreement in the Provincial Chamber.

    48.2 To thereafter refer that collective agreement to the GPSSBC for ratification.

    48.3 In the absence of its failure to comply with the above the change in the shift system was in breach of the terms of the collective agreement and therefore a nullity.

49. A substantial portion of the union's argument was that the Multilateral Labour Forum ("MLF") was the wrong forum for negotiations or

consultations. The applicant submitted in this application that this is a non-issue for the following reasons:

49.1 In deciding to consult with the unions the employer was not engaging in a process which it was required to follow in order to comply with the collective bargaining regime.

49.2 Even if it was required to engage in negotiations (which is denied), it could never have been required to negotiate with the third respondent as it had no members which it represented and it is senseless to suggest that a failure to consult or negotiate with a union that was not representative at the time that a decision was taken can give rise to an outcome that that union is entitled to have set aside.

49.3 Thirdly those unions that did engage in the process indeed agreed to the implementation of the 7-day working week. A number of the employees who the third respondent now purports to represent as disenchanted with the outcome of that process are in fact persons who were members of trade unions that signed on to the process. It is accordingly not open to

them, having now switched union allegiance some years later, to assert that they are not bound by steps taken on their behalf by the trade unions of which they were members at the time.

50. The employer did not argue that there was any serious dispute about the way in which relevant clauses of the relevant collective agreements were to be understood. Instead it argued that those clauses were simply not applicable to the particular facts or circumstances of the case.

51. The arbitrator reasoned as follows:

51.1 A change to a shift system is not something that falls within the prerogative of an employer but requires the agreement of workers before these changes can be implemented.

51.2 The arbitrator accordingly found that there was "*no reason why the regulations of the hours of work should not fall within the definition and ambit of terms and conditions of employment (as defined)*".

51.3 The core object of a collective agreement was to regulate terms and conditions of employment.

51.4 The employer's argument that no collective agreement was needed to implement the change to this shift system therefore falls to be rejected.

51.5 Given that the changes were required to be the subject matter of a collective agreement they had to be referred to the co-ordinating chamber for ratification.

51.6 Even if they were not the subject matter of a collective agreement but merely a decision of the employer, then it was still incumbent upon the employer to refer this decision to the co-ordinating council for ratification.

51.7 Even if the head of department had a managerial prerogative to unilaterally implement the change, the employer was not entitled to implement the change until this "decision" had been referred to the co-ordinating chamber for ratification.

51.8 Any argument raised by the employer along the lines that it was under a duty to consult and that it had satisfied such duty by consulting with the unions in the multilateral forum established in terms of Resolution 1 of 2004 could not assist the employer as this multilateral forum had been disestablished by resolution 9 of 2003 which provided for the disestablishment of all provincial bargaining councils. The consequence of this disestablishment was that the first respondent became the sole forum for collective bargaining about issues within its jurisdiction from 30 June 2004.

52. In all the circumstances, the arbitrator found, there had been no compliance by the employer with Resolution 3 of 2004 and Resolution 2 of 2005.

THE GROUNDS OF REVIEW

53. The applicant submitted that the arbitrator's award reflects a fundamental misunderstanding of a number of principles of collective labour law applicable to the application of the collective bargaining process under the LRA. I agree. As will become apparent from the

discussion below, the arbitrator failed properly to appreciate the task before him and misconstrued the evidence. [12]

54. I agree with the applicant's submission that the point of departure should have been to establish whether the applicant was in law obliged to negotiate a collective agreement before changing the working times on a duty roster.

55. Had the existing employees indeed had a contractual entitlement to only work fixed hours and at fixed times from Monday to Friday, a unilateral amendment to the duty roster could not have been implemented by the employer. Consent to a variation to terms and conditions would indeed have been required in those circumstances. As already pointed out, however, no such contractual entitlement existed in respect of the employees affected by the shift system. Indeed, the regulations quoted above specifically provided that working hours were to be fixed by the head of department. The arbitrator was obliged to have regard to and apply the applicable statutory regime.[13]

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[12] *SA Municipal Workers Union on behalf of Petersen v City of Cape Town & Others* (2009) 30 *ILJ* 1347 (LC) at paragraphs 47-8. Anton Myburgh, "Sidumo v Rustplats: How have the Courts dealt with it?" (2009) 30 *ILJ* 1 contains a useful review of case law on review.

[13] In the public service the employer may have statutory authority to act in way that differs from private sector `norms'. An arbitrator must obviously give effect to the applicable statutory regime. When an official agrees to enter the service of the state he contracts at his appointment that he will

56. Accordingly, the question when terms had to be agreed on and of how the collective bargaining framework was required to operate was entirely irrelevant. The arbitrator in effect finds that all changes to all shift systems have to be negotiated and agreed on prior to implementation. This was clearly an incorrect statement of the law in general, and was moreover an error of law and fact when given the facts of relevance in the instant case.

57. The award is reviewable on this ground alone. Simply put, the employer was under no obligation in law to obtain consensus with employees or their trade union representatives prior to implementing the changes to the times during which duties were to be performed in future. The head of department had a power under the regulations to implement these changes. He exercised this power. Any discussions

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serve the state in accordance with the statutes and statutory regulations from time to time operative. See *Solidarity on behalf of Steyn v Minister of Correctional Services* (2009) 30 *ILJ* 2508 (LC) at para 15: "The court must read the [Public Service Act] consistently with the Correctional Services Act and the law of contract to avoid a conflict of laws. By doing so in this case the court finds that in addition to the contract of employment and the Correctional Services Act, the provisions of the PSA and its regulations govern the employment of the applicant. Regulation B3.1 of chapter 1 of part VII of the Public Service Regulations therefore applies to the contract of employment. Effectively, the applicant is barred from seeking employment in the public service, in this case in the Department of Correctional Services. The court accordingly finds that the contract of employment is void *ab initio*." See also , as a further example, the cases on deemed discharge provisions for AWOL employees cited in *Public Servants Association of SA on behalf of Van der Walt v Minister of Public Enterprises & another* (2010) 31 *ILJ* 420 (LC) at para 15.

that were held with trade unions around this issue may have been of value in the promotion of good labour relations but no question of the non-observance of any legal obligation arose.

58. In any event, and even if collective bargaining had been required, the award is still reviewable for a number of reasons.

59. The third respondent was not a party to the collective agreement allegedly breached and as such could not challenge the outcome. In 2006 it represented no employees whose contracts were, on its own version, altered. The union representatives of these employees were in fact different trade unions. The pleadings set out the actual union affiliations of the individual employees who the third respondent purports to represent in this dispute. In fact, it appears that they were members of unions other than PAWUSA. Those unions have not complained that what the employer did breached the rights of any of their members, and nor were they joined as parties to the arbitration proceedings.

60. The LRA expressly promotes the principles of orderly collective bargaining. It is hardly consistent with the principles of the Act to allow

a trade union – who was not even the collective bargaining agent of the affected employees at the material time – to claim that its right to represent its members has been breached. If anyone were to have standing to come along to raise this complaint then it would have to be the trade unions who were parties to the agreement which the third respondent alleges has been breached and they would then have done so on behalf of their members.

61. It is also significant that the third respondent did not contend that the alleged breach arose out of a failure to negotiate with, for example, NEHAWU, (the union who represented most traffic officials at the time), or with any other union. Instead it contends that there was some obligation to negotiate with it. This does not make sense as the persons concerned were neither its members and nor was it a party to the collective bargaining framework.

62. The arbitrator's finding that the subject matter under review had to be negotiated and embodied in a collective bargaining agreement in the provincial chamber of the GPSSBC, which then had to be referred to the council of the GPSSBC, is clearly incorrect, and reviewable. There is no basis on which third respondent would have standing to raise any

complaint about something not having been sent to the co-ordinating chamber as it also had no representation on that body at that time. In fact it still has no representation on that body because it is too small a union and has not acquired the membership threshold required for representation on that body.

63. That the third respondent had no standing is further evidenced by the following:

63.1 Only one of the 62 employees it claimed to represent in the arbitration was a member of the union at the time when the dispute was referred.

63.2 Two were not employed by the applicant.

63.3 Seventeen persons were for the first time only employed after the new shift system had been implemented. Nowhere is it explained what unilateral change to their terms and conditions could possibly have resulted subsequent to their employment as the only contractual regime that could possibly have existed for

the entire duration of their employment is the contractual regime currently in force.

64. The arbitrator's award is flawed in one further respect. The new 7 day week shift system was applied not only to the third respondent's members, but also to other employees within the Department who are members of other unions. Inasmuch as the arbitrator's award may result in the shift system having to revert to the pre-February 2006 position, or having to be changed in some other fashion, it obviously affects the rights also of those other unions (who are parties to the ORA and/or parties to the collective agreement embodied in Resolution 3 of 2004). Those unions had a vital interest in the proceedings and the arbitrator should have joined them to the proceedings, in order to afford them an opportunity to be heard in relation to the issues in dispute and the relief sought by the Third Respondent.

CONCLUSION

65. For these reasons the award is set aside with no order as to costs.

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ANTON STEENKAMP

Judge of the Labour Court

Date of hearing:	29 September 2010
Date of judgment:	22 October 2010
For the applicant:	Colin Kahanovitz SC
Instructed by:	The State Attorney