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Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: J 2276/10

In the matter between:

JOHANNESBURG METROPOLITAN BUS SERVICES (PTY) LTD	**Applicant**
and	
SAMWU	**First respondent**
IMATU	**Second respondent**
Employees listed in Annexure A	**Third and further respondents**

JUDGMENT

STEENKAMP J:

INTRODUCTION

1] Johannesburg Metropolitan Bus Services (Pty) Ltd ("Metrobus") implemented a revised shift schedule on 6 December 2010. Is this a

unilateral change to bus drivers' terms and conditions of service? If so, the trade unions who are the respondents (SAMWU and IMATU) are entitled to call their members out on a protected strike. If not, their intended strike is unprotected and stands to be interdicted.

2] The dispute came before me by way of the return day of a rule *nisi* granted by Bhoola J – on an unopposed and urgent basis – on 6 December 2010.

3] The first respondent is the South African Municipal Workers Union (SAMWU). It anticipated the return day on 48 hours' notice and I heard the matter on an urgent basis on Friday 10 December 2010.

4] The second respondent is the Independent Municipal and Allied Workers' Union (IMATU). IMATU abides the decision of the court.

5] The third and further respondents are the affected bus drivers.

BACKGROUND FACTS

6] Metrobus transports commuters in the greater Johannesburg area using a scheduled bus service. It transports about 90 000 passengers daily, with approximately 498 buses covering approximately 80 scheduled routes and approximately 130 school routes.

7] The bus drivers employed by Metrobus are mostly members of SAMWU or IMATU. They work according to a shift system. Their contracts of employment do not specify a particular shift. Their maximum working hours are set out in collective agreements of the South African Local Government Bargaining Council (SALGBC).

8] According to Metrobus, the current driver shift system has resulted in overcrowding on some routes and underutilisation of buses on other routes. As a result, it has implemented a revised driver system which will have the effect of revising both shifts and routes worked. It maintains that

this will be to the benefit of the travelling public and will improve the sustainability of the company. SAMWU says that it will have the opposite effect on its members. Although their working hours will not be longer, some bus drivers – depending on their shift – may have to stay at the depot later. The new shifts may also be less convenient to them.

9] Metrobus initially wrote to SAMWU and IMATU as long ago as 8 February 2010 in order to consult about the proposed changes. It held a meeting with shop stewards on 17 February 2010. The matter could not be resolved. Shop stewards were requested to provide written inputs by 24 February 2010, but did not do so. On 1 March 2010 Metrobus requested the unions to provide input by 5 March 2010. In the spirit of the World Cup 2010, though – or, more cynically, to prevent industrial action during the World Cup – Metrobus took no further steps to implement a revised shift system over the next five months.

10] On 30 September 2010 Metrobus informed the unions once again that it intended to implement the revised driver shift system. Metrobus informed the unions that it wished to implement the new shift system by 15 November 2010. It requested feedback by 15 October 2010. Metrobus reiterated that the review of existing schedules did not mean that a retrenchment exercise was underway but was required in order to comply with the needs of commuters and to grow business in areas where it could not currently cope with demand.

11] On 8 October 2010 IMATU replied and requested further time to respond. Metrobus granted it time until 27 October 2010. On 20 October 2010 Metrobus sent a further letter to both unions. It acknowledged IMATU's request for additional time and requested a response from SAMWU. On 26 October 2010 Metrobus wrote to SAMWU again. The pertinent sections of the letter indicated that:

- it was regretted that SAMWU had not responded to Metrobus's earlier letters;

- "...it is still our conviction to embrace any constructive submissions from your office. To this end and in the interests of your members, we wish to call you with a chance to make submissions on the matter not later than 3 November 2010." If no submissions were received, "management will assume that you … consent with [*sic*] the new shift changes";

- Metrobus anticipated the introduction of the new schedules by 15 November 2010 "and the same day, shifts will be displaying at the operating depots drivers to peruse and pick";

- operationally Metrobus's schedules are "inefficient and not in sync with our commuter needs"; and the state of the schedules determines the overall efficiency of the bus company.

12] On 4 November 2010 SAMWU's branch chairperson wrote back, referring to the letter of 30 November 2010. He stated that the September letter was "ambiguous" and that "we could not understand whether you consult or propose to have a meeting to discuss around your proposal". He called for a meeting on a date to be agreed.

13] Despite this proposal, Metrobus wrote back to SAMWU on 8 November 2010 and stated:

> "As indicated in our letter dated 30 September 2010 and our subsequent correspondences in this regard, the revised shifts have now been placed on the notice boards. This is in line with our implementation date as previously communicated in the letter referred to above. We therefore request that you advise your members to interact with their line managers, to bring any concerns arising from these duties as a matter of urgency."

14] On 12 November 2010, shop stewards went to the officers of the managing director. Metrobus maintains that they "stormed an Exco meeting" and then refused to discuss the revised shift schedule. SAMWU denies that they "stormed" the meeting and say that they wanted to seek clarity about why a meeting scheduled for the previous day did not occur.

Be that as it may, the parties did discuss the issue again on 15 November 2010 but could not resolve it.

15] On 22 November 2010 SAMWU referred a dispute about an alleged unilateral change to terms and conditions of employment to the SALGBC. It also wrote to Metrobus the demands that the employer to restore the terms and conditions of employment that applied before the alleged change. It sought an undertaking from Metrobus to do so by no later than 24 November 2010.

16] Metrobus responded by denying that it had implemented a unilateral change to terms and conditions of employment.[1] The managing director of the company set out in some detail the history of attempted consultations dating back to February 2010. He stated that "the implementation of a shift system does not amount to a breach of the main collective agreement in that it is not an amendment to working hours agreed at a national level." He went on to say that:

> "We are advised that a change to the method of performing work may only amount to a change to terms and conditions of employment if it entails a change to the essential nature of the job and there has been no unilateral change to terms and conditions of employment of bus drivers.
>
> "Given that there has been no unilateral change to terms and conditions of employment, the provisions of section 64(4)(a), (b) or section 64(5) of the LRA do not apply to this dispute and Metrobus is not obliged to halt its implementation of the revised shift scheduling system."

17] On 29 November 2010 Metrobus indicated in a memorandum to drivers that they should review the new shifts and bring any anomalies to management's attention. That did not occur.

18] On 2 December 2010 IMATU referred a dispute about a unilateral change to terms and conditions of employment to the SALGBC. It demanded, in terms of s 64(4) of the LRA, that the employer not unilaterally change the proposed changes that led to the dispute for 30 days, or that it restore the

1 The letter attached to the pleadings is undated, but it is common cause that it was received by SAMWU in response to its letter of 22 November 2010.

terms and conditions of employment that applied before the change.

19] On 6 December 2010 Metrobus implemented the new shifts. There is a dispute between the parties as to whether a strike actually started on that day. What needs to be decided, though, is whether the unions are entitled to strike in terms of s 64(4).

20] Metrobus launched an urgent application and the rule *nisi* was granted on an unopposed basis on 6 December 2010. The unions were called upon to show cause why a final order should not be granted in the following terms:

19.1 declaring that the revised shift scheduling system does not amount to a unilateral change to terms and conditions of employment,

19.2 interdicting the third and further respondents (i.e. the bus drivers) from refusing to comply with the obligation to work in accordance with the revised shift scheduling system of the applicant and in accordance with the operational requirements of the applicant;

19.3 declaring the strike action embarked upon by the respondents from Monday, 6 December 2010 to constitute unlawful and unprotected industrial action;

19.4 interdicting and restraining the respondents from engaging in, proceeding with, participating in, calling for, supporting, encouraging or exciting employees to engage in unprotected strike action in support of the demand that the revised shift scheduling system not be implemented by the applicant;

19.5 directing the respondents forthwith to cease any industrial action relating to an alleged unilateral change to terms and conditions of employment and to comply with the provisions of this order;

19.6 ordering the first and second respondent to inform the third two further respondents to desist from participating in unprotected strike.

21] There was a further order relating to service of the rule *nisi*; and an interim order with regard to costs.

22] SAMWU anticipated the return day on 48 hours' notice on 8 December 2010. Thus this matter was enrolled for hearing on Friday 10 December 2010.

Conditions of service

23] SAMWU points out that many of the affected bus drivers were employed by the greater Johannesburg Metropolitan Council (GJMC) on a contract basis prior to the formal establishment of Metrobus. When their employment became permanent they were not asked to sign new employment contracts.

24] Apart from their employment contracts, the bus drivers' conditions of service were governed by the "Conditions of Employment Agreement: Transvaal" published in the *Government Gazette* on 28 October 1994.[2] These conditions of service had been negotiated and agreed to by the parties to the Industrial Council for the Local Government Undertaking, i.e. the relevant trade unions and employer organisations. Clause 9 of that collective agreement sets out the working days and working hours for local government employees. It sets out maximum working hours but does not specify any shift system.

25] When Metrobus was corporatised in 2000, the bus drivers were transferred from the GJMC to Metrobus in terms of s 197 of the LRA on the same terms and conditions of employment that governed them previously. They did not sign new employment contracts.

26] On 5 April 2003 Metrobus concluded a collective agreement with SAMWU and IMATU after a protracted strike of five weeks. The parties agreed, *inter alia*, that:

2 Regulation Gazette no 5416, No R1828

- shifts will not exceed 13 1/2 hours; and

- workers shall be allowed to pick shifts on seniority.

27] The "picking" of shifts needs to be explained. The current shift system comprises three shifts, namely the day shift, a spread-over and the night shift. These shifts are subject to –

- agreed maximum working hours;

- implementation of shifts by Metrobus in accordance with a schedule relating to routes at the times that shifts are worked; and

- the right of drivers to pick shifts according to their seniority.

28] The picking of shifts was explained in court at the hand of scheduled shifts at the Milpark depot. Metrobus decides on the shift schedule overall. Within the schedule, it assigns certain routes and times. For example, on shift number 215, a driver on the old schedule would start his duties at 05:30 and stop at 09:50. He would be on duty again from 10:20 until 12:10; and again from 12:10 until 14:00, thus comprising 8 working hours. But a senior bus driver has the prerogative to pick a shift, ie a route and hours that suits him best. For example, he may pick shift number 202 in order to have the afternoon free. He would then sign on at 04:15; sign off at 08:05; and assume duty again from 09:35 until 13:35, after which he is free for the rest of the day (comprising 07:50 working hours).

29] It is clear from this example that the bus drivers (or the unions) do not have a say in the actual compilation of a shift system or the schedules within that system. The drivers only have the prerogative, according to seniority, to pick specific routes and hours within the existing shift schedule.

30] The change implemented on 6 December 2010 comprises a change in the

scheduling of current shifts to change the routes and the times when shifts are worked. None of the following is changed:

- the three shift system;
- the agreed maximum hours;
- shift allowances;
- night work allowance;
- standby allowance;
- the right of drivers to pick shifts according to their seniority.

31] Although the maximum working hours will not change, the new routes and hours may lead to some drivers leaving the depot later. For example, on shift 215 a driver will only finally sign off at 18:25 instead of 14:00; but he would still work for only eight hours. On the other hand, a driver on shift number 211 will finally sign off at 14:30 instead of 15:20, having started work at 05:20 or 05:10 respectively. It is within this system where the senior drivers at the prerogative to pick the more favourable shifts.

Unilateral change to terms and conditions of employment?

32] The new shift schedules will not affect the agreement reached in 2003. Shifts will not exceed 13 1/2 hours; and drivers will still be allowed to pick shifts on seniority.

33] Similarly, the new schedules will not affect the agreement of the parties in 2007 that drivers could pick shifts according to seniority.

34] SAMWU further relies on a minute of a task team meeting of 8 February 2010 where the following is reflected: "Amendment of shifts is not allowed

without consulting."

35] Metrobus disputes the accuracy of that minute. For the purposes of argument, though, and in accordance with the rule in *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd*[3], I will accept that it is indeed an accurate minute.

36] But that does not assist the unions. It provides only for consultation. As I have set out above, Metrobus has entered to consult on the revised shift schedules since February 2010. The question remains whether it 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 Service*[4] this court dealt with a very similar question. In that case, SAPS implemented an 8 hour shift 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[5] 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 a vested right to preserve their working times unchanged for all times. The alteration 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."

38] And in *NUMSA v Lumex Clipsal (Pty) Ltd*[6] the court held that additional tasks assigned to machine operators and a revised shift system did not

3 1984 (3) SA 623 (A)
4 (2005) 26 *ILJ* 2403 (LC)
5 As he then was (para [84] at 2427 H – J)
6 Unreported, J 1070/98, Labour Court, 24 August 2000

amount to a unilateral change to terms and conditions of employment. The court referred to *CDM (Pty) Ltd v Mine Workers Union of Namibia*[7] where the Labour Court of Namibia held that a unilateral change will be illegitimate where it is "so fundamental as to amount to a change in contract". That court, in turn, cited with approval the *dictum* in the English case of *Creswell v Board of Inland Revenue*[8] where it held that "...an employee did not have a vested right to preserve his working conditions completely unchanged and must adapt himself to new methods and techniques". In *Creswell* it was held that:

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

39] The Labour Appeal Court considered a similar issue in *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA.*[9] Workers were instructed to operate two machines instead of one. The court held as follows:[10]

"The evidence of what constituted the terms of employment of the applicants was vague. Most of the applicants did not sign letters of appointment. They were employed as operators in terms of oral contracts and were trained on machines upon the commencement of their employment. The more recently employed applicants signed letters of appointment in which it was specified that they were appointed as operators and required to perform any task that might reasonably be expected of them.

On those facts it was not a term of the contracts of employment that the applicants would operate only one machine. A description of the work to be performed as that of "operator" should not, in my view, ". . . be construed inflexibly provided that the fundamental nature of the work to be performed is not altered": *Wallis*, Labour and Employment Law, par 45 p7-19. I agree with the view expressed by the learned author at p7-23 fn 9 that employees do not have a vested right to preserve their working obligations completely unchanged as from the moment when they first begin work. It is only if changes are so dramatic as to

7 1997 (2) LLD 65 (LCN)
8 (1984) (2) AER 713 (CHD)
9 [1995] 4 BLLR 11 (LAC). The judgment of the court *a quo* is reported at (1992) 13 *ILJ* 663 (IC).
10 At 19 (my emphasis).

amount to a requirement that the employee undertakes an entirely different job that there is a right to refuse to do the job in the required manner. In *Creswell v Board of Inland Revenue* (1984) 2 All ER 713 (ChD) at 720b-d, Walton J said:

"I now turn straight away to a consideration of the main point on which counsel for the plaintiffs relied. He put his case in this way, that although it is undoubtedly correct that an employer may, within limits, change the manner in which his employees perform a work which they were employed to do, there may be such a change in the method of performing the task which the employee was recruited to perform proposed by the employer as to amount to a change in the nature of the job. This would mean that the employee was being asked to perform work under a wholly different contract and this cannot be done without his consent . . .

It is a very fine line from counsel's submissions to the submission that employees have a vested right to preserve their working obligations completely unchanged as from the moment when they first begin work. This cannot surely, by any stretch of the imagination, be correct."

See, too, *De Beers Consolidated Mines Ltd (Finch Mine) v The National Union of Mine Workers and Others*, an unreported decision of the Northern Cape Division of the Supreme Court, case no 1111/92."

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 with regard 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 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.

Costs

42] The parties have an ongoing relationship. Both parties acted reasonably by approaching this court on an urgent basis to obtain clarity on their rights in terms of the LRA. in law and fairness, I do not deem it appropriate to order either party to pay the costs of the other.

ORDER

43] The rule *nisi* granted on 6 December 2010 is confirmed. There is no order as to costs.

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ANTON STEENKAMP

JUDGE OF THE LABOUR COURT

Date of hearing: 10 December 2010

Date of judgment: 14 December 2010

For the applicants: Adv Tim Bruinders

Instructed by: Bowman Gilfillan

For the respondent: Adv Gys Rautenbach

Instructed by: Cheadle Thompson & Haysom