REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

NOT REPORTABLE

CASE NO: J164/13

In the matter between:

PIKITUP (SOC) LTD **Applicant**

and

SAMWU obo MEMBERS **First Respondent**

EMPLOYEES OF THE APPLICANT WHOSE **Second Respondent**

NAMES APPEAR ON ANNEXURE "A" **& Further Respondents**

Heard: 5 August 2013

Delivered: 13 August 2013

Summary: When proposed strike may be interdicted. Whether implementation of new alcohol / substance abuse and access control systems matters of mutual interest and therefore matters on which employees may strike.

JUDGMENT

HULLEY, AJ

Introduction

[1] On 26 July 2013, Snyman AJ granted an order in the following terms:

> "1. Condonation is granted and 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 I 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.

5. This order shall be served on the respondents in the following manner:

5.1 By telefax to the first respondents to its regional offices;

5.2 By telefax to the first respondent's head office in Cape Town;

5.3 By displaying a copy of the order on any notice boards for employees at the applicant's premises;

5.4 By reading the content of the order to those second to further respondents present at the premises of the applicant at the time;

5.5 By sending an SMS to the cellular telephone numbers of those second to further respondents that the applicant has on record, advising that the proposed strike on 29 July 2013 has been declared to be unprotected and that they are interdicted and restrained from commencing with such strike;

5.6 By providing a copy of the order to any of the individual second to further respondents that request a copy of the same.

6. The issue of costs are reserved for argument on 12 September 2013.
7. Written judgment pursuant to the granting of this order will be handed down on 5 August 2013."

[2] On 2 August 2013, the respondents filed a notice of their intention to anticipate the return day for 10h00 on 5 August 2013. At the same time they filed their answering affidavit.

[3] The matter was handed to me shortly before 10h00 on 5 August 2013. I regret that I have been unable to fully debate the issues which arose for consideration with the respective counsel.

Background to the dispute

[4] The applicant is a municipal entity as defined in s 1 of the Local Government: Municipal Systems Act[1]. It provides a waste management service in the greater Johannesburg area on behalf of the City of Johannesburg.

[5] The applicant has recently introduced two new systems in the workplace.

5.1 The first was in respect of alcohol / substance abuse. It had two components to it, one being the mandatory testing of the applicant's truck drivers and the other being random testing of employees other than truck drivers.

5.2 The second related to access control / time keeping.

[6] There is some confusion regarding the alcohol / substance abuse testing. The deponent to the applicant's founding affidavit, Ms

[1] Act 32 of 2000

Amanda Nair, the Managing Director of the applicant, states:

> "The testing, in respect of drivers takes the form of a breathalyser test which they undergo prior to receiving the keys of the truck they are scheduled to drive. If the test is positive, they are not given the keys and the normal procedures are followed, whether they are disciplinary steps or steps in terms of the Applicant's Employer Assistance Programme."

[7] The implication is that the form of testing in respect of non-drivers is something other than the breathalyser test. Having regard to the rest of the papers, this implication seems unlikely. I will accordingly assume that the breathalyser test is the only test which has been introduced in the workplace, whether it be the mandatory (truck driver) tests or the random (non-truck driver) tests.

[8] There is a further aspect to this confusion. If one has regard to the founding affidavit the first demand was that the applicant should desist from random alcohol / substance abuse testing (which was in respect of non-truck drivers), an allegation which was admitted by the respondents. Notwithstanding this, the deponents to both affidavits dedicated most of their energy to advancing or challenging, as the case may be, *compulsory* testing (which was only in respect of truck drivers). I have resolved this confusion with reference to certain minutes handed up at the hearing. I deal with the minutes further below.

[9] According to the applicant there had been a number of fatal and other serious accidents as a result of its truck drivers driving whilst under or allegedly under the influence of alcohol.

[10] In order to counter this, the applicant, in the exercise of its managerial prerogative and in pursuance of its obligations under the

Occupational Health and Safety Act[2] decided to introduce the breathalyser test.

[11] The breathalyser apparatus (a photograph of which was attached to the replying affidavit) is a handheld device resembling a torch. It has various switches, including an on / off switch and a passive switch.

[12] According to the information leaflet attached to the replying affidavit the device operates in two modes: passive and active. In active mode the subject is instructed to blow into the sampling cone "from a few centimetres away". A beeper will sound to indicate that a sufficient sample has been captured and the result of the alcohol test will be reflected shortly thereafter. In passive mode the cone is placed in front of the subject's mouth while he or she is speaking or breathing. The result of the test will be reflected after a few seconds. The passive mode is used in circumstances where the subject cannot or will not blow into the instrument, for instance, where the subject refuses to co-operate or where the subject has difficulty in blowing into the instrument or is unconscious.

[13] The access control system is a biometric, fingerprint analysis system. A single fingerprint is taken from each of the employees and is, presumably, retained in an electronic database. An employee who wishes to gain access to certain areas or who wishes to record his or her arrival at the commencement of a shift or departure at the conclusion of a shift, has to place his or her finger on an electronic reader pad which would then scan the information from his or her fingerprint and, presumably, match it to the information on the database. If there is a match, access to the particular area would be authorised and a record of the time and date of the relevant

[2] Act 85 of 1993

transaction. In this way, the system operates both as a form of access control and a time recording device.

[14] The introduction of these two new systems has given rise to unhappiness amongst the employees.

[15] On 30 April 2013, the first respondent referred a dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA).

[16] According to Nair, the demand articulated by the first respondent was as follows:

> "The first respondent demanded that the applicant cease (a) to conduct random alcohol / substance abuse testing at all its depots and (b) to implement the biometric time and control system."

[17] This is admitted by the respondents in their affidavit.

[18] A copy of the referral form was handed to me at the hearing of this matter. In paragraph 3 of the referral form, the first respondent was required to summarise the facts of the dispute. it did so as follows:

> "The workers demand that there be no:
> 1. Breathalyser test and;
> 2. No biometric time / control system"

[19] The demand in respect of the breathalyser testing articulated in the referral form appears to be broader than that which is alleged (and admitted) to be the demand set out in Nair's affidavit (paragraph 16 above).

[20] The matter was conciliated and on 15 July 2013 the Commissioner issued a certificate stating that the dispute remained unresolved as at that date.

[21] In its founding affidavit, the applicant challenged the proposed strike on the following bases:

21.1 The demands were not in respect of matters of mutual interest.

21.2 The demands were unlawful and therefore any strike action based upon such demands would be dysfunctional.

[22] In relation to the breathalyser test Nair alleged that the demands were unlawful in as much as the first respondent sought "to prevent the applicant from ensuring that its employees do not consume alcohol or any other intoxicating substance during working hours whilst carrying out their duties." She contended that the employees were "not entitled to demand not to be subjected to alcohol / substance abuse testing and embark on a strike action to create such a right."

[23] With regard to the attendance system, Nair alleged that a demand "relating to the non-implementation of the biometric access control and time attendance system will equally be unlawful and unenforceable." In this regard she contended that the previous attendance system had been abused to the extent that employees were paid money for their attendance when in fact they had not performed work and that such was public money derived from the fiscus. The implication was that any demand which undermined the efficient control of public money was unlawful.

[24] By the time the matter was argued before me, the allegation of unlawfulness in respect of the demand relating to the biometric access control system was either abandoned or not pressed. Instead, a tender was made.

[25] In their answering affidavit (which was deposed to by Mr Menzi Lethuli, an official of the first respondent), the respondents pointed out that the biometric access control system had been the subject of negotiation at the Local Labour Forum for a while. Lethuli explained, in relation to the first respondents' members who were employed within the Refuse Collection & Removal (RCR) unit, that the introduction of the system operated unfairly:

> "These employees ordinarily finish their work, earlier than other employees, often around midday. Prior to the biometric access control system, these employees were permitted to return home directly from site whereas now, they are required to return to the depot merely to clock out using the biometric access control system. This has cost and time implications for the affected workers."

[26] With regard to the breathalyser testing, the first respondent indicated that its members had objected to its implementation out of "hygiene concerns". Luthuli explained:

> "Workers are expected to use a single tester, creating high risk of illness and disease. In addition, some SAMWU members reported being tested positive despite the fact that they had not consumed alcohol recently. Whatever the cause of such problems, it is well known that breathalyser testers (which are less accurate than blood tests) must be regularly calibrated and administered by properly trained staff."

[27] At that stage, the respondents had not yet (on the papers, at least) been confronted with the explanation as to how the breathalyser apparatus operated. That explanation was only provided for the fisrt time in the replying affidavit. Mr *Van der Riet*, who appeared on behalf of the respondents, did not, however, object to the

introduction of this new material.[3]

[28] The first respondent explained that there were concerns as to the reliability of this breathalyser system which had the capacity to lead to disciplinary action and were also considered "degrading" to the workers because, so they contended, it suggested a distrust of them.

[29] The first respondent noted that it would be happy to reassess its position, "if the applicant behaves reasonably and addresses the workers' legitimate concerns."

[30] Whilst acknowledging that the applicant was obliged to take reasonably practicable steps to ensure a safe working environment, the respondents denied that the method suggested was the only method and noted that there other ways of achieving the same goals.

[31] In the replying affidavit, Nair contended, in relation to the breathalyser testing, that –

> "it wold be rash, irresponsible, unlawful and contrary to its duty to the public for the Applicant, as a public institution, not to do everything reasonably within its power, *including* utilising breathalysers, to ensure that its employees do not proceed on duty under the influence of alcohol." (My emphasis)

[32] Nair also contended that, because different individuals present differently when consuming alcohol –

> "in the absence of a scientific test, *such as* a breathalyser, it is impossible for the applicant to judge, on an *ad hoc* basis, who is and who is not under the influence of alcohol and should not be operating one of the applicant's vehicles and posing a

[3] *KG v. CB & Others* 2012 (4) SA 136 (SCA), at 149D – G

risk to other employees and the public at large." (My emphasis)

[33] The applicant pointed out that a person being tested was not required to make contact with the breathalyser apparatus and attached documentation which demonstrated how the apparatus was to be used. The applicant accordingly contended that the argument of the respondents that the method of testing was unhygienic was accordingly without merit. For the first time in reply, the applicant contended that:

> "In relation to employees being tested positive for alcohol, despite the fact they had not consumed alcohol recently, to the extent that this happens, an 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."

[34] The applicant rejected the notion that the tests were degrading and pointed out that the breathalyser apparatus had to be calibrated on a frequent basis and a certificate issued.

[35] With regard to the biometric access control system, the applicant pointed out that all its staff had already enrolled and provided their fingerprint (presumably for capture on the database). The implication was that they could not now assert that the system was undignified.

[36] Insofar as the Refuse Collection & Removal employees were concerned, the applicant acknowledged the problem raised by the respondents, pointed out that the problem was not raised until 29 July 2013 (i.e. three days after the *rule nisi* was issued by Snyman AJ), and noted that the concern could easily be addressed by the introduction of mobile biometric readers.

[37] At the hearing of the matter, Mr *Myburgh*, who appeared on behalf of the applicants, made the following tender with regard to the biometric access control system:

> "In resolution of the access control dispute, the applicant tenders that the RCR employees are not required to return to the depot upon completion of their duties, this pending the introduction of the mobile biometric machines."

[38] Mr *Myburgh* accordingly contended that since this was the only aspect of the biometric access control system which was in dispute, it accordingly followed that the tender put an end to that dispute and, accordingly, that the respondents were no longer entitled to strike in respect of that issue.

The right to strike

[39] The right to strike is enshrined in the Constitution of the Republic of South Africa[4] (the Constitution). Section 23 of the Constitution provides that:

> "(1) Everyone has the right to fair labour practices.
> (2) Every worker has the right –
> (a) to form and join a trade union;
> (b) to participate in the activities and programmes of a trade union; and
> (c) to strike.
> (3) …
> (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1)."

[4] Act 108 of 1996

[40] The Labour Relations Act[5] is the instrument by which Parliament has given effect to and regulated the fundamental rights conferred by s 23 of the Constitution.[6]

[41] The Labour Relations Act itself introduces certain limitations upon the right to strike. The first, and less obvious limitation, is by virtue of the definition given to a strike. Section 213 defines it 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 mutual interest between employer and employee …"

[42] There are three key features to a strike as defined.[7]

42.1 There has to be a requisite act or omission by employees.

42.2 The act or omission must be concerted.

42.3 It has to be directed at the achievement of a specified purpose.

[43] Further limitations are created by introducing certain procedural (s 64) and substantive (s 65) prerequisites.

[44] In general terms,[8] the procedural requirements are these.

44.1 The issue in dispute must have been referred to a

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[5] Act 66 of 1995
[6] See s 1 of the Labour Relations Act
[7] *National Union of Mine Workers on behalf of Employees v CCMA* [2012] 1 BLLR 22 (LAC)
[8] I do not propose to provide a thorough analysis of the section.

bargaining council or the CCMA and must remain unresolved.

44.2 The employer or employers' organisation or, if the issue in dispute relates to a collective agreement, the bargaining council, must have been given at least 48 hours' notice in writing of the commencement of the strike.

[45] The substantive requirements, once again in general terms, are the following:

45.1 There must be no collective agreement prohibiting a strike in respect of the issue in dispute.

45.2 There must be no agreement which requires the issue in dispute to be referred to arbitration.

45.3 The issue in dispute must not be one which is arbitrable or justiciable in terms of the Labour Relations Act.

45.4 The workers must not be engaged in an essential service or a maintenance service

[46] If the activity engaged in by workers constitutes a strike and the strike satisfies both the procedural and substantive requirements of the Labour Relations Act, the workers will then enjoy the protection set out in s 67 of the Labour Relations Act.[9] This means that they enjoy immunity from *inter alia*:

46.1 Delictual or contractual claims.

[9] *Ceramic Industries Limited t/a Betty's Sanitary Ware v National Construction Building & Allied Workers Union (2)* (1997) 18 ILJ 671 (LAC)

46.2 Dismissal.

46.3 Civil legal proceedings.

[47] It seems almost too obvious to state, but it is worth bearing in mind that if certain conduct or activity does not constitute a strike as defined (no matter how closely it may resemble it), it will not be subject to the strike provisions of the Labour Relations Act. This means, in the first instance, that there is no need to comply with the procedural and substantive requirements. It also means, in the second instance, that the conduct or activity will not enjoy the protection offered by s 67 of the Labour Relations Act. In short, whether the conduct or activity may be interdicted will depend upon considerations unrelated to Chapter IV of the Labour Relations Act.

[48] It is appropriate at this stage to deal with a few further aspects of the strike definition, the first being the phrase "for the purpose of" (and aspects of that purpose) and the second being the phrase "any matter of mutual interest".

[49] The phrase "for the purpose of" demonstrates that the refusal to work or the retardation or obstruction of work must have as its goal or objective the "remedying" of a grievance or the "resolution" of a dispute; if the goal or objective is something else, it would not amount to a strike.[10]

[50] There is authority for the proposition that if the goal or objective is *legally* unattainable the demand is unlawful and the proposed actions (I am mindful not to use the word strike) on the part of the employees may be interdicted. Thus, in *TSI Holdings* Zondo JP held that a demand which was unlawful or which required the employer to

[10] *SA Scooter & Transport Allied Workers Union & others v Karras t/a Floraline* (1999) 20 ILJ 2437 (LC), at 2447A

commit an unlawful act

> 'falls outside the category of demands that can be supported by a concerted refusal to work, retardation or obstruction of work envisaged in the definition of the word "strike" …'[11]

[51] The employer would be legally incapable of complying with the demand and, therefore, the objective of the concerted refusal to work[12] could not be to remedy the grievance or resolve the dispute. (It appears that this would apply irrespective of whether the employees were aware that the grievance could not legally be remedied or the dispute legally resolved on the basis suggested by them.)

[52] In *ECAWU v Southern Sun*[13] Francis AJ (as he then was) noted that the fairness or otherwise of a demand made by a union was not justiciable unless the demand was 'so outrageous or unconscionable' that it could be inferred therefrom that the party making the demand had no intention to reach agreement. In other words, if the concerted refusal to work did not have as its objective the attainment of an agreement, it would not amount to strike action.

[53] Thus, in *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union & Others*[14], Basson J held that once the dispute which gave rise to the strike had settled, any refusal to work beyond that point could no longer constitute a

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[11] *TSI Holdings (Pty) Ltd & Others v. National Union of Metalworkers of SA & Others* (2006) 27 *ILJ* 1483 (LAC), at 1498E – F. See also the minority judgment of Ngcobo J in *National Union of Metalworkers of SA & Others v. Bader Bop (Pty) Ltd & Another* 2003 (3) SA 513 (CC), at 539H

[12] It seems that Zondo JP considered the actions on the part of the employees to amount to strike action, after all he confirmed the rule which declared "the strike" to be unlawful.

[13] *Entertainment Commercial & Allied Workers Union & Others v Southern Sun Hotel Interest (Pty) Limited* (2000) 21 ILJ 1090 (LC). See also *Greater Johannesburg Transitional Metropolitan Council v Independent Municipal & Allied Workers Trade Union* [2001] 9 BLLR 1063 (LC)

[14] (1997) 18 *ILJ* 550 (LC), at 556A

strike in terms of the act as the dispute no longer existed and an essential element of the definition of strike had fallen away.

[54] I turn now to consider the phrase "any matter of mutual interest". An historical analysis of the phrase demonstrates the difficultly in providing a precise definition.[15]

[55] It was described by Van Niekerk J as 'broadly speaking … any matter concerning employment',[16] but with respect to the learned Judge this definition is too broad (as the learned Van Niekerk J himself recognised).

[56] True, the matter must be one "between employer and employee", but it must also be one "of mutual interest" to them. This implies that there must be a reciprocal interest in the matter. I appreciate that the phrase "mutual interest" is something of a term of art and should not, necessarily, be understood in a literal sense.

[57] In *SA Democratic Teachers Union v Minister of Education & others*[17] Landman AJ (as he then was) noted that the meaning to be attributed to the phrase is more easily described (with reference to examples) than defined:

> '43.2 Generally speaking a dispute relating to proposals for the creation of new rights or the diminution of existing rights is a dispute of mutual interest, ordinarily to be resolved by collecting bargaining. *Gauteng Provincial Administration v Scheepers* (2000) 21 *ILJ* 1305 (LAC); 2000 (7) BCLR 756 (LAC) at 760B-D; See also *Hospersa v Northern Cape Provincial Administration* (2000) 21 *ILJ* 1066 (LAC) at 1070I-

[15] John Grogan, *Collective Labour Law* (Juta, 2007), pp. 88 – 91
[16] *City of Johannesburg Metropolitan Municipality & another v SA Municipal Workers Union & others* (2011) 32 *ILJ* 1909 (LC) at 1914H, with reference to *De Beers Consolidated Mines Ltd v CCMA & others* [2000] 5 BLLR 578 (LC)
[17] (2001) 22 *ILJ* 2325 (LC)

1071D.

43.3 The term 'dispute of interest' has been stated to be a term of art. Although it is widely used in the labour relations community, it has never been precisely defined but the term generally is well understood. *Hlope v Transkei Development Corporation* (1994) 15 *ILJ* 207 (ICTk) at 209D-212H; *NUMSA v Fry's Metal (Pty) Ltd* (2001) 22 ILJ 701 (LC) at 706F-H and 707A-B and 707G; *Mineworkers Union v AECI Explosives & Chemicals Ltd Modderfontein Factory* [1995] 3 BLLR 58 (IC) at 64H-66D and 65F-G; *National Union of Mineworkers v Goldfields of SA* (1989) 10 *ILJ* 86 (IC) at 99C-G.

43.4 A matter of mutual interest has been held to be one which can fairly and reasonably be regarded as calculated to promote the well-being of the industry concerned: *Rand Tyres & Accessories v Industrial Council for the Motor Industry (Tvl)* 1949 TPD 108 at 115. It was held in *Durban City Council v Minister of Labour & another* 1948 (1) SA 220 (N) at 226, that the term 'matter of mutual interest' cannot be without limitation, for otherwise the result would often be absurd.

43.5 The courts have approved the following passage from a paper delivered by Professor PAK Le Roux 'Criteria in Interest Arbitrations' (delivered at the 1992 Independent Mediation Service of South Africa Conference):

'The meaning of the terms ''dispute of right' and ''interest disputes' have been the subject of some debate. Rights disputes are normally seen as disputes concerning the existence, content and extent of legal rights and the interpretation of a legal rule. Disputes of interest, on the other hand, are generally regarded as being concerned with

the creation of new rights rather than the interpretation and application of existing rights.'

Approved in cases such as *Sithole v Nogwaza NO & others* (1999) 20 *ILJ* 2710 (LC); [1999] 12 BLLR 1348 (LC) at 1356A-C.

43.7 As the case law demonstrates, the typical situation in which matters of mutual interest are raised is where, for example, workers demand changes in salary or remuneration or other conditions and benefits of employment such as working hours, shift arrangements, allowances, etc.'

[58] A useful indication of the meaning to be given to the phrase is to be found in s. 1 of the Labour Relations Act.

> "The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are –
>
> (a) …
>
> (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can –
>
> (i) collectively bargain to determine wages, terms and conditions of employment and *other matters of mutual interest*". (Emphasis added)

[59] It is clear that wages and terms and conditions of employment are matters of mutual interest. It is clear also, from the use of the phrase "such as", that they are not confined to such matters. That having been said, what the Legislature considered *examples* of matters of mutual interest is a useful indication of what the broader phrase was intended to mean. This is in keeping with the views expressed by

Landman AJ (as he then was) in *SA Democtratic Teachers Union* above.

[60] Thus, *purely* political matters or those in respect of which one or both of the parties has no interest, cannot be properly described as matters of mutual interest. That is not to say that no political matter will ever constitute a matter of mutual interest; it depends upon the interest shown to exist therein.

[61] In short, it appears to my mind that a matter of mutual interest is one in respect of which both employer and employee, in their capacities as such, have an interest. Whether an employer and employee have such an interest in a given case is a matter of fact to be determined with reference to all the evidence.

The issues in dispute

[62] In determining the true nature of the dispute it is the duty of the Court to consider the substance of the dispute and not the form in which it is presented. In this regard Ngcobo J has held:

> [52] 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. It is also important to bear in mind that parties may modify their demands in the course of discussing the dispute or during the conciliation process. All of this must be taken into

consideration in ascertaining the true nature of the dispute.[18]

[63] I have set out above the allegations made by the parties regarding the issues in dispute in the founding and answering affidavits.

[64] In addition, the first respondent has attached the minutes of two meetings held at the Local Labour Forum on 8 December 2010 and 27 June 2012 respectively.

[65] The following can be gleaned from the minute of the 8 December 2010 meeting.

65.1 The first respondent objected to the biometric access control system. It was particularly unhappy with what it considered to be bad faith on the part of the applicant in implementing the system and demanding that the process be stopped at head office and indicated that it would call upon its members not to participate in the project.

65.2 With regard to the alcohol and substance abuse system, the first respondent was of the view that breathalyser testing had to be treated within the breathalyser assistance programme and expressed misgivings with regard to the safety (presumably hygiene) of the apparatus and its accuracy. It contended that the system of breathalyser testing was degrading.

[66] The minute reflects that the representatives of the applicant pointed out that the system utilised was entirely safe and that there was no risk of contamination.

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[18] *National Union of Metal Workers of South Africa & Others v Bader Bop (Pty) Ltd & Another* 2003 (3) SA 513 (CC), at 540D – E. See also *City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union & Others* (2009) 30 *ILJ* 2064 (LC), at 2069G

[67] The minute of the 27 June 2012 meeting indicates, in regard to "Alcohol and Substance abuse":

> "Management indicated that they have received a positive response from the employees from the workshop. The project is progressing very well and there has (*sic*) been twelve referrals already indicating that the employees are well aware of this project."

[68] There is no indication of the response from organised labour.

[69] It is not clear from the minute that the aforesaid was said with reference to the proposed implementation of the breathalyser tests.

[70] With regard to the biometrics system, the minute of 27 June 2012 reflects that the first respondent "still holds the view that a clocking card system will be better and cheap[er] than the proposed metric system."

[71] Having regard to all the available information, it appears that the true nature of the first respondent's demand was the cessation of the biometric access control system and the breathalyser testing system.

The judgment of Snyman AJ

[72] In granting the interim order, Snyman AJ rejected the applicant's argument that the demands made by the employees required the applicant to act unlawfully.[19]

[73] The learned Judge, however, granted the interim order on the basis that the demands related to matters which fell within the 'operational issues of the employer's business' and were therefore beyond the

[19] Par. 47 of the judgment

purview of collective bargaining.[20] He reasoned that:

> 'Collective bargaining is not participative management. In fact, separate provision is made in the LRA for participative management to some extent under the ambit of work place forums where provision is made for either consultation with the employer or joint decision making with the employer on a variety of topics." (Footnotes omitted)

[74] The learned Judge noted that employees had no right to bargain with regard to the appropriate accounting software package to be used, which marketing agency to engage in marketing the employer's products, which email service provider to use or how its executive committee would function. These, he found were 'operational management issues' and could not form the basis of collective bargaining.

[75] It seems, to my mind, that the learned Judge considered that 'operational management issues' were excluded from matters of mutual interest.

[76] I do not propose commenting upon the examples given by the learned Judge. In my view, each case must be dealt with on its own facts and it would be difficult, if not dangerous, to attempt to make assessments in advance and without reference to any factual matrix.

[77] I turn now to consider the issues which arise for consideration in this matter.

<u>The dispute regarding breathalyser testing</u>

[78] At the hearing of this matter I indicated to Mr *Van der Riet* that I was satisfied that the disputes concerned matters of mutual interest.

[20] Par. 41 of the judgment

Having researched this issue more fully, it seems my initial instinct was, perhaps, overly hasty. The issue is hardly as clear-cut.

[79] I turn now to consider that issue fully.

[80] In the founding affidavit, Nair explained that if the result of the breathalyser test was positive, "the normal procedures are followed, whether they are disciplinary steps or steps in terms of the Applicant's Employer Assistance Programme". This allegation was denied in the answering affidavit, but no factual material was provided to support the denial. The denial must accordingly be rejected.[21]

[81] If it is true that the only novelty introduced by the breathalyser system was the *method* of detecting alcohol and substance abuse (and I must accept that that was the case), then, absent concerns such as, for instance, hygiene, dignity or the like, the employees would ordinarily not have a sufficient *employment* interest in the matter.

[82] The example provided by the court in *Durban City Council v. Minister of Labour & Another*[22] (a case referred to and relied upon by Landman AJ in the *SA Democratic Teachers Union* case, *supra*) is instructive:

> 'Although the words could hardly be wider, it is clear that some limitation must be placed upon them, otherwise the result would often be absurd. I could give a hundred examples, but I content myself with one. Suppose a main thoroughfare, leading to the Barracks, among other places, and used regularly by the residents

[21] *Room Hire Co. (Pty) Ltd v. Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T), at 1163, 1165

[22] 1948 (1) SA 220 (N), at 226, overruled in *Amalgamated Engineering Union v Minister of Labour* 1949 (4) SA 908 (A), but on a different point.

> of the Barracks and by the public, were in need of repair, that would be a matter of mutual interest to the Council and the employees residing at the Barracks, and suppose the employees demanded that it should be repaired at once and the Council declined to repair it until six months had passed. No one could suggest that this difference [dispute] between the Council and the employees would fall within sec. 24 (1), or would be a dispute within sec. 35 (1), because it would have nothing to do with the work upon which the employees are engaged nor the conditions of their employment.'

[83] That case was decided under a different statute, but the example remains compelling.

[84] The present case, however, stands on a different footing. I say so for the following reasons:

84.1 First, one of the central reasons for introducing the system was to provide a safe working environment for the employees. In my view, the method used to do so must necessarily be a matter in respect of which the employees have an interest.

84.2 Secondly, in the replying affidavit Nair explained that if the result of the breathalyser test was positive and the employee disputed it, he or she could request a further test and if still positive could demand that a blood test be administered. 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, raises serious concerns. These are matters in respect of which the employees have a legitimate interest. They are, in my opinion, matters of mutual interest to both employer and employee.

[85] I am not prepared to hold that because the decision to implement the breathalyser system falls within the "managerial prerogative", it is thereby excluded from the class of matters of mutual interest. In my view, the issue is not whether it falls within the managerial prerogative; it is whether it is a matter of mutual interest.

Was the demand to desist from implementing breathalyser tests unlawful?

[86] Mr *Myburgh* in his heads of argument contended that the demand was unlawful because "it will result in the company failing to meet its legal obligations".

[87] The lawful obligations he referred to are those in ss. 8 and 9 of the Occupational Health and Safety Act. Those sections insofar as is relevant read 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 –
>
> (a) …;
>
> (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) …

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."

[88] Nothing in these sections compels the applicant to make use of breathalyser testing as a method of averting any potential harm to employees and the public and the respondents do not seek to prevent the employer from discharging its obligations under those sections.

[89] It would require substantial evidence to demonstrate that the use of breathalyser tests was the only method or only reasonably practicable method by which the applicant could discharge its obligations. Such evidence is absent in the present case.

[90] The applicant has argued that the respondents have not demonstrated any reasonable alternatives. I do not think it was for them to do so. To succeed on this point, the applicant had to

demonstrate that the only method or only reasonably practicable method by which it could discharge its obligations under ss. 8 and 9 was by means of breathalyser tests. If necessary, it should have made use of expert testimony to assist it in this regard.

[91] As Mr *Van der Riet* correctly pointed out, before the applicant decided to implement the breathalyser system could it be said that it was acting contrary to the provisions of ss. 8 and 9 of the Occupational Health and Safety Act? In my view, the *mere* fact that the applicant was not utilising a breathalyser test on its truck drivers cannot mean that it was acting in conflict with ss. 8 and 9.

[92] In any event, whatever the lawfulness might be of the demand relating to the compulsory administration of breathalyser tests (in respect of truck drivers), there is no suggestion that the such unlawfulness extends to non-truck drivers.

[93] It will be recalled that the breathalyser test is administered in respect of two different classes of employees, truck drivers and non-truck drivers. Non-truck drivers would, for instance, include employees who travel on the refuse trucks and collect the refuse, but do not drive the trucks, but for whom a safe working environment is also to be ensured. They are subject random testing and the possibility of blood tests (albeit at their own request), should they fail the initial breathalyser tests.

<u>The biometric access control system</u>

[94] As noted above, the applicant, through its counsel, made a tender in respect of the RCR employees.

[95] I have set out the true nature of the dispute regarding the biometric access control system above. The dispute appears, on the face of it,

to be broader than the RCR employees.

[96] Nevertheless, the respondents in their answering affidavit do appear to have confined their objection to the biometric access control system to the RCR employees only. Whatever the initial issue in dispute might have been, parties are at liberty to change their stance as negotiations progress. A court can only deal with the case actually presented by the parties.

[97] The question I have to determine is whether the tender satisfied the concerns raised by the respondents with regard to the RCR employees and, if so, whether it put an end to that dispute. In my view, it did.

[98] Notwithstanding my finding with regard to the breathalyser testing, my finding under the present head remains relevant because it means that the respondents cannot continue to engage in a concerted refusal to work for the purpose of getting the applicant to accede to their demand in respect of the biometric access control system. Thus, if the dispute regarding the breathalyser test was to be resolved, the strike would be over.

The order

[99] In all the circumstances, I make an order in the following terms:

99.1 The *rule nisi* is discharged.

99.2 The applicant is ordered to pay the costs of the respondents.

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Hulley, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant:	A. Myburg, S.C.
Instructed by:	Tshiqi Zebediela Attorneys
For Respondents:	J. G. Van der Riet, S.C.
Instructed by:	Cheadle Thompson & Haysom Attorneys