

SOUTH AFRICA / JUDGMENT

IMATU v Johannesburg Metropolitan Municipality and Others (J1522/14) [2014] ZALCJHB 232 (30 June 2014) [2014] ZALCJHB 232

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhemaje

CASE / FILE NUMBER

J1522/14

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J1522/14

IMATU obo MEMBERS IDENTIFIED IN

ANNEXURE ‘MLG 1’.....First to Further Applicants

and

THE JOHANNESBURG METROPOLITAN MUNICIPALITY..... First Respondent

JOHANNESBURG METROPOLITAN BUS SERVICE..... Second Respondent

SOUTH AFRICAN MUNICIPAL WORKERS UNION.....Third Respondent

Heard: 26 JUNE 2014

Delivered: 30 JUNE 2014

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This application was brought before the court on an urgent basis in terms of which the Applicants seek a declaratory order to interdict and restrain the continuation of a lock-out, which they contend is unprocedural and unlawful. Relief is only sought against the Second Respondent, who is the employer of the Further Applicants (The Employees/Drivers). The Applicants further seek an order that with immediate effect, the Second Respondent should allow them to return to their usual places of work and to render their services (picked shifts) in accordance with the picking that took place on or about 10 to 12 March 2014, and further that the Second Respondent be ordered to pay them within 30 days from the date of this order, any and all remuneration due to them backdated to when the lock-out started. The Third Respondent is merely cited as an interested party.

Background

to the application:

- [2] The Second Respondent is not a party to the SALGBC, and workplace related issues are discussed between the employer and the two trade unions (IMATU and SAMWU) within an internal structure called 'Union Management Meeting or Committee' (The UMC). Amongst the issues discussed at this level include the shift system or the so-called shift picking system, which is applicable to bus drivers. Within the UMC is a task team that deliberates over matters surrounding the shifts, and which in turn reports to the UMC for decision making.

- [3] A dual shift system (Referred to as the First Shift System) has been in place for drivers over time. This incorporated the so-called

'disability shift' system and the 'ordinary shift' system. In terms of this system, drivers used to elect to work on a particular shift, and once allocated to that shift, they had nothing to do with the other system.

- [4] As a consequence of a shortage of drivers and disparities in allocation in shifts, the UMC resolved that the disability shift

system which at the time only had two drivers allocated to it and who were unable to manage it, would now form part of the ordinary shift system, resulting in all normal shifts being allocated to a common pool of shifts. (The Second Shift System). In terms of this shift system, which the Applicants contend should be implemented, the drivers were allowed to pick specific shifts which they wanted to work. Picking of shifts has been a practice over time, and in this regard, the drivers picked a shift once a year in accordance with seniority. Thus the most senior driver is allowed to pick a shift which he or she will be allocated to for a period of one year. The disability shift part of picking system comes with remuneration and benefits attached to it and it is obviously more lucrative than the other shift. IMATU's members have generally always been more senior, and thus got preferences in the choice of shifts. The last picking process in terms of

the old shift system took place between 10 and 12 March 2014, and was to be implemented with effect from 1 April 2014. According to IMATU, the picking exercise was agreed to at a UMC meeting held on 28 February 2014.

- [5] Due to disgruntlement raised by SAMWU or its members about the Second Shift System as it was biased towards senior bus drivers, a Third Shift System was discussed for introduction with the parties on 14 and 31 March 2014. IMATU's contention is that there was no agreement reached on the implementation of the Third Shift System in these meetings. It further held the view that if there were any other meetings concerning the shift system after March 2014, it had been excluded from such meetings. Since there was no other meeting it was aware of, there could not have been any agreement outside of the UMC regarding the change in the shift system, and to that end, it contended that its members were entitled to report for duty as per their choices.
- [6] The Second Respondent's contention is that it has implemented this system despite disagreements over the Second Shift System, and IMATU had stated on 1 April 2014 that its members would work in accordance with the shifts that they picked (Second Shift System). According to the Second Respondent, the shift system is not part of the driver's terms and conditions of employment, and it contended that it did not require the consent of the Unions or bus drivers to implement the change in the shift system. The Second Respondent denied that it had held bilateral discussions with SAMWU, and was of the view that it was entitled to implement the changes following from the meeting of 31 March 2014. It denied that the Second Shift System was at any stage implemented.
- [7] The Third Shift System was implemented with effect from 12 May 2014. This had caused members of IMATU to be unilaterally taken off their picked shifts and placed on other shifts or other workstations. Only some of the IMATU members (mainly the Applicants in this case) had in response continued to report for duty in terms of the First Shift System, i.e, the shifts that they had elected in March 2014. The Second Respondent had not allowed IMATU members to report for shifts as they had chosen, and had insisted that they should report for duty in terms of the new system.
- [8] On 22 May 2014, the Second Respondent had issued a notice locking out a number of employees from the premises with effect from 24 May 2014 in response to what it termed unprotected strike. With a view of resolving the impasse, a meeting was held on 2 June 2014 at which IMATU was informed that its members had embarked on an unlawful industrial action, that a lock-out had been instituted in response to the industrial action, and that as a consequence, those not reporting in terms of the third shift system were to be disciplined for misconduct. The Second Respondent according to IMATU was adamant at that meeting that the Third Shift System would be implemented and remain operational.

- [9] On 2 June 2014, the bus drivers who were not reporting for duty in terms of the third shift system were informed that they would be required to appear before a disciplinary enquiry scheduled for 12 June 2014 to answer to allegations that between 16 and 19 May 2014 they had refused to render their services; insubordination and embarking on unlawful industrial action. It was common cause that the disciplinary enquiries were postponed to 27 June 2014 by agreement.

Urgency:

- [10] Central to the Second Respondent's argument was that this application was not urgent for a number of reasons. Urgent

applications are dealt with in terms of Rule 8 of the Rules for the Conduct of proceedings in the Labour Court which provide that;

"(1) A party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and, if applicable, 7(7).

- (2) The affidavit in support of the application must also contain-
- (a) the reasons for urgency and why urgent relief is necessary;
 - (b) the reasons why the requirements of the rules were not complied with, if that is the case; and
 - (c) if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted".
- [11] The Labour Appeal Court in *Jiba v Minister: Department of Justice and Constitutional Development and Others*[1] (as also referred to by the Second Respondent) explained the requirements of this Rule as follows:

"Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and the degree to which the ordinary applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self-created when seeking deviation from the rules".

- [12] From the above authorities, it follows that an applicant seeking urgent relief must adequately set out in the founding affidavit, the reasons for the urgency and must give cogent reasons in some detail and explain why urgent relief is necessary. Failure to do so inevitably will result in the application being struck off the roll for want of urgency. The basis for allowing parties to dispense with the Rules of Court relating to time periods is to prevent the occasioning of an injustice and involves the balancing of this consideration with that of the rights of parties to a considered opportunity to place their cases before the court[2].

- [13] The Applicant's contention was that up to 2 June 2014, they were still hoping for a resolution of the dispute through dialogue. A number of requests for the transcript of the UMC meetings held on 14 and 31 March 2014 were made and these were only received on 13 June 2014. Even then, only one set of the transcript was made available. Furthermore, it was submitted that the continued unlawful lock-out will perpetuate the Applicants' suffering under an unlawful employment practice by an employer within the broader public administration; that the lock-out had dire consequences for IMATU members and their dependants, and that the urgency lay in the violation of fundamental rights and in the abuse of power. As the application was brought on short notice, it was further submitted that it was not possible for the Applicants to comply with the rules of the court regarding procedures and forms.
- [14] The issues pointed out on behalf of the Applicant in contending that the matter is urgent mainly pertain to the consequences and effect of the lock-out. Other than these factors, which may or may not necessarily persuade the Court to treat the matter as urgent, it is still required of the Applicants to show the Court that they had indeed acted with due haste when the act leading to the consequences or effects took place or arose. This requires an examination of the timeline of events leading to the launching of this application.
- [15] On the Applicants' own description of the chronology of events, the last picking in terms of the 'First shift system' took place in March 2014. Thereafter, meetings were held in March and April 2014 to discuss the shift system. According to IMATU, the Second Respondent had started to implement the 'Third shift system' with effect from 12 May 2014. The Second Respondent's contention was that it had implemented the new system with effect from 1 April 2014. Whichever date the new system was implemented, the bus drivers had nevertheless presented themselves for service in terms of the old picking system until 24 May 2014 when they were locked out. They had received notices of the lock-out in terms of section 64 (3) (d) of the LRA on 22 May 2014. There is no explanation as to the reason this application was not launched then, or immediately thereafter, as the consequences of that lock-out, more particularly the non-payment of the drivers were felt then.
- [16] After the lock-out had taken effect, all IMATU did was to dispute the Second Respondent's contention that its members had embarked on a strike. At the last meeting held on 2 June 2014, the Second Respondent had made its intentions clear that it would not go back to the old shift system. It had further made its intentions clearer by issuing notices of disciplinary enquiry to the drivers on 2 June 2014. Surely if IMATU was still of the view that the lock-out was unlawful for the reasons it had advanced, and in the light of the notices of the disciplinary enquiry, the matter could not have been more urgent then. Even more curious, after the the Second Respondent had made its position clear in the meeting of 2 June 2014, I fail to appreciate the reason that

IMATU would still have any hope that any further engagement with the Second Respondent would yield any results. Inasmuch as parties are encouraged to afford dialogue an opportunity, a line has to be drawn where the one party unequivocally makes its intentions clear that it would not move from its position, and it is at that point that the other party must then look at its options. To this end, IMATU's contention that it had hoped that further dialogue after 2 June 2014 would yield any results is feeble.

- [17] Instead of approaching the Court immediately after 2 June 2014, and especially after the Second Respondent had made its stance clear, IMATU had instead instructed its attorneys to write a letter to the Second Respondent on 6 June 2014, which letter merely reiterated its position on the shift system, the discussions that took place prior to the lock-out and its stance on the issue of the shift system. Nothing new arose from this correspondence. The letter to the Second Respondent had also demanded that the drivers be allowed to report for duty in terms of the old system failing which if no undertaking was given in that regard by 10 June 2014, IMATU would approach the Court on an urgent basis. Again, if the matter was urgent, I fail to appreciate the reason IMATU would give the Second Respondent such an extended time within which to respond, when especially the latter had made its position clear on the matter on 2 June 2014.
- [17] The Second Respondent's attorneys of record responded on 10 June 2014 after having received the letter on 9 June 2014. In a detailed response, the Second Respondent had *inter alia* reiterated its position on the issue of shifts, and had indicated further that any changes to the shift system did not require the consent of the Unions, and that it was entitled to implement those changes. The Second Respondent had refused to provide any undertakings. Even then, and after this emphatic response, IMATU failed to act.
- [18] The Applicants' main contention however in regards to urgency was that they could not approach the Court sooner as requests for a transcribed record of the minutes of 14 and 31 March 2014 was made several times, and the transcript was only provided on 13 June 2014, and even then only the transcript of the meeting of 14 March
2014. I again fail to appreciate the necessity or importance of a transcript of the minutes of 14 and 31 March 2014 when even thereafter, the Second Respondent's adamant position has always been that it had the prerogative to implement the new shift system, and would not go back to the old system.
- [19] Having received a transcript, IMATU still challenged the correctness of the minutes. Even if these minutes were to dispel the notion that indeed there was no agreement reached on the new system, they had absolutely nothing to do with the launching of this application in the light of the events subsequent to 12 May 2014 after the Second Respondent had implemented the third shift system. These minutes would not have taken the matter any further in that whether they reflected an agreement or not would have been moot in the light of the subsequent events and actions taken by the Second Respondent.

[20] Even if it were to be believed that a transcript of the minutes of the meeting was relevant, having received that transcript on 13 June 2014, the Applicants only filed this application on 20 June 2014, some seven days later. No explanation was proffered as to the reason this was the case other than the argument made from the bar that there was a holiday on 16th June 2014. This argument or excuse is not sustainable in that a holiday or weekend cannot prevent parties from drafting court papers, especially if it is alleged that a matter is urgent. Urgency also implies that a party should itself have acted in like manner. To this end, taking into account the chronology of events, more specifically the fact that the new shift system was implemented from 12 May 2014; that the drivers were locked out with effect from 24 May 2014, and the fact that notices of disciplinary enquiry were issued on 2 June 2014, it is my view that the Applicants were dilatory in approaching the Court. To this end, the Applicants have not satisfied the requirements of urgency, and in effect, and in the light of the conclusions reached above, the urgency alleged is clearly self-created.

Conclusions and the issue of costs:

[21] In the light of the conclusions on the question of urgency, it follows that the application should be struck off the roll. The only issue for determination pertains to costs.

[22] It is my view that this application was ill-conceived for a number of reasons. Other than the dilatory manner with which it was launched, it was doomed from the start in view of the issues that are allegedly in dispute, which this Court have pronounced upon in the past[3]. The refusal of the Applicants to work in terms of the new system clearly constitutes industrial action, more so since they do not have any contractual right to choose how and where to work. This is a matter that falls within the prerogative of the employer, and Steenkamp J in Johannesburg Metropolitan Bus Services (Pty) Ltd[4] made this point clearer by stating that as employees do not have a vested right to specific shift system in collective agreement or contract of employment, changes to the system is merely a change in work practice, and did not comprise a unilateral change to terms and conditions of employment. Thus employees have no vested right to preserve working conditions completely from the moment they are employed. Furthermore, it is unheard of that employees can choose where and how to work unless the employer agrees to the employee's preferences.

[23] It follows that the Applicants cannot allege that they are not on strike by merely presenting themselves for service but on their own terms. In these circumstances, as the employees do not want to, or refuse to work in accordance with the specific instructions of the employer, i.e. the third shift system, their conduct constitutes 'strike' as contemplated in section 213 of the LRA, which remains unprotected. In bringing this application, it was not for the purposes of ensuring clarity on the matter or asserting their rights. The application was brought merely to assert their own preferences as to how they want to work. The fact that some of IMATU members have complied with the changes whilst only the Applicants remain defiant speaks volumes about the folly of bringing this application. This court must in the circumstances, show its displeasure at such conduct, which as correctly pointed out by Mr. Patel on behalf of the Second Respondent, constitutes an abuse of the court process. In

these circumstances, considerations of law and fairness dictate that the Applicants should be ordered to pay the costs of this application.

Order:

- (i) The application is struck off the roll on account of lack of urgency.
- (ii) The Applicants are ordered to pay the costs of this application.

Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Adv. F Van der Merwe

Instructed by: Francois Du Plessis Attorneys

For the Respondent: Mr. A Patel of Cliffe Dekker Hofmeyer Attorneys

[1] (2010) 31 ILJ 112 at para 18

[2] National Police Services Union and Others v National Negotiating Forum and Others (1999) 20 ILJ 1081 (LC)

[2] National Police Services Union and Others v National Negotiating Forum and Others (1999) 20 ILJ

1081 (LC)

[3] See Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU & Others

(2011) 32 ILJ 1107 (LC) and also City of Johannesburg Metropolitan Municipality & others v SAMWU & Others

(2011) 32 ILJ 1909 LC

[4] *supra*

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