REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no.D68/12

In the matter between:

APOLLO TYRES SOUTH AFRICA (PTY) LTD Applicant

and

NATIONAL UNION OF METALWORKERS OF

SOUTH AFRICA ("NUMSA") **First** Respondent

EMPLOYEES EMPLOYED AT APOLLO TYRES

SA (PTY) LTD (DURBAN FACTORY) Second and Further Respondents

Heard: **9 February 2012**

Delivered: **15 February 2012**

Summary: Application for interdict and declarator: collective agreement: What constitutes a term and condition of employment and a work practice.

JUDGMENT

GUSH J.

[1] The applicant seeks a declarator that its proposed changes to its shift patterns at its Durban factory do not constitute a unilateral change to the second and further respondent's terms and conditions of employment. In the event that it is decided that the change does not constitute a unilateral change to their terms and conditions of employment that the second and further respondents be interdicted from embarking on a strike until they have complied with the provisions of section 64 of the Labour Relations Act (the Act).[1] The application was postponed on 1 February 2012 to today to enable the respondents to file replying affidavits.

[2] The applicant in this matter is a manufacturer of tyres for motor vehicles and has factories in Durban and Ladysmith, where it manufactures bus and truck radial tyres and earth moving vehicle specialist tyres. The applicant employs six hundred employees at its Durban Factory.

[3] The Durban factory production is designed in accordance with 24 hour 7 day week production schedule.

[4] In April 2004, the applicant and the first respondent entered into an agreement,[2] expressly deemed to be a "collective agreement"[3] regarding the implementation of a 12-hour 3-shift system in respect of those employees employed in the Durban factories "truck and radial [tyre] department". It is common cause that at a later stage the parties orally agreed to extend the shift system to the rest of the applicant's factory.

[5] Despite the fact that the parties recorded that the stated intention or purpose of the collective agreement was '... for [Apollo] to cease operating illegally and in contravention of the Basic Conditions of Employment Act and to implement a shift pattern which complies with the requirements of the Basic Conditions of Employment Act',[4] it appears that the newly shift pattern did not achieve this purpose and the applicant was obliged to apply for ministerial determinations

[1] Act 66 of 1995.
[2] See annexure AA to the respondent's answering affidavit page 179 of the indexed pleadings
[3] Clause 1.2 of the agreement page 179 of the indexed pleadings.
[4] Clause 1.3 of the agreement page 179 of the indexed pleadings.

in accordance with the Basic Conditions of Employment Act (BCEA), which were granted, the last of which expired on 30 June 2011.

[6] Shortly after the expiry of the last determination, the applicant commenced a consultation process with the first respondent with a view to amending the shift patterns set out in the agreement of 2004. The applicant in its papers was at pains to describe the proposed changes as 'an amendment to shift rotations' whilst the respondents were equally adamant that the changes amounted to a substantive change to shift patterns. The relevance of their respective averments related to the issue as to whether the changes constituted a unilateral change to the second and further respondents terms and conditions of employment as opposed to a change in the applicant's work practices thereby falling within the applicant's managerial prerogative.

[7] I am not persuaded that there is any merit in the distinction the parties wish to draw from the terminology or that these terms are relevant to the determination of this dispute. The crux of the issue to be decided is simply this: Do the applicant's proposed changes to a shift system (to use a neutral term) constitute a unilateral change to terms and conditions of employment or does it fall within the realms of a work practice and accordingly fall with management's prerogative to effect the change. Accordingly this matter will not be determined by the details of the proposed changes but whether in the specific circumstances of this matter the shift pattern recorded in the collective agreement constitutes a term and condition of employment.

[8] In similar vein, the respondents made much of the applicant's decision not to continue applying for ministerial determinations but to endeavour to reach consensus on the proposed changes. The mere fact that the applicant elected not to continue applying, whether the application would have been successful or not, does not in any way assist in deciding whether the shift patterns are a term and condition of employment.

[9] In its founding affidavit the applicant referred to and annexed correspondence and documentation relating to the consultation process which preceded tha descision to implement the changes to the shift pattern. These documents

record the reasons the applicant advanced for wishing to change the shift patterns. These reasons are the following:

9.1 Compliance with the BCEA;

9.2 Achieve the objects of the BCEA and Occupational Health and Safety Act;

9.3 Uncertainty regarding the continued granting of determinations;

9.4 Excessive overtime with regard to training;

9.5 Adverse effect on business and future productivity;

9.6 Negative impact on Durban factory profitability; and

9.7 Low productivity/less efficient processes

[10] Surprisingly the applicant did not attach to its papers a copy of the 2004 collective agreement. The agreement was attached to the respondents' papers.

[11] The parties were unable to reach consensus on the proposed changes during the consultation process and the applicant gave notice that it intended implementing the changes with effect from 1 February 2012.

[12] In reply, the respondents advised the applicant that they regarded the proposed changes as constituting a unilateral change to terms and conditions of employment and that they would tender their services in compliance with the existing shift pattern if the change was implemented.

[13] In addition the respondents referred a dispute regarding the proposed changes to the relevant bargaining council as a dispute concerning a unilateral change to terms and conditions of employment and had requested that the applicant comply with section 64(4) of the LRA. At the time that the application was heard no certificate in terms of section 64(1)(a) had been issued and a period of 30 days from the date of the referral had not elapsed.

Counsel for the respondents noted however that the respondents had amended their referral to include a mutual interest dispute in the alternative.[5]

[14] The respondents relied on the collective agreement and the extension thereof as the basis upon which the shift patterns had been agreed contractually to constitute part of the second and further respondents' terms and conditions of employment.

[15] It is necessary however at the outset to consider whether a change to shift patterns constitutes a unilateral change to terms and conditions of employment and what constitutes the exercise of the applicants managerial prerogative. The issue of what falls within the managerial prerogative to change and what constitutes a change to terms and conditions of employment has been dealt with extensively in our courts.[6]

[16] In two recent decisions of this Court,[7] the Court has accepted that a change to shift systems does not in itself a unilateral change to an employee's terms and conditions of employment but merely a change to the employer's work practice. In both matters, the court held that in the absence of a contractual right to work the previously agreed shift pattern the regulation of shift times constituted a work practice and fell within management's prerogative to change.

[17] The respondents argued that the collective agreement had established this contractual right to work the agreed shift patterns change and accordingly they formed part of the second and further respondents' terms and conditions of employment.

[18] Whilst conceding that the agreement specifically refers only to employees in the applicant's "truck and radial [tyre] department" the respondents argued that when the shift patterns were by agreement extended to the rest of the

[5] See section 64 (1) and 64 (4) of the LRA.
[6] See *A Mauchle (Pty) Ltd t/a Precision Tools v National Union of Metal Workers of SA and Others* (1995) 16 ILJ 349 (LAC); *SA Police Union v National Commissioner of the SA Police Service* 2005 (26) ILJ 2403 (LC) and *National Union of Metalworkers of SA on behalf of its Members v Lumex Clipsal (Pty) Ltd* (2001) 22 ILJ 714 (LC).
[7] *Johannesburg Metropolitan Bus Services (Pty) Ltd v SA Municipal Workers Union and Others* (2011) 32 ILJ 1107 (LC) and *Ram Transport SA (Pty) Ltd v SA Transport and Allied Workers Union and Others* (2011) 32 ILJ 1722 (LC).

factory the terms of the agreement became terms and conditions of the employees to whom the contact was extended. It was common cause that the extension of the agreement was not recorded in writing.

[19] Collective agreements are defined in the LRA as

> ''collective agreement' means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-
>
> (a) one or more employers;...'[8]

[20] Section 23 of the LRA regulates the Legal effect of a collective agreement:

> '(1) A collective agreement binds-
>
> (a) the parties to the collective agreement;
>
> (b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them;
>
> (c) the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates-
>
> (i) terms and conditions of employment; or
>
> (ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;
>
> (d) employees who are not members of the registered trade union or trade unions party to the agreement if-
>
> (i) the employees are identified in the agreement;
>
> (ii) the agreement expressly binds the employees; and

[8] Section 213 of the LRA.

(iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.

(2) A collective agreement binds for the whole period of the collective agreement every person bound in terms of subsection (1) (c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered trade union or registered employers' organisation for the duration of the collective agreement.

(3) Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.'

[21] Considering these provisions of the LRA, the first question to be answered is whether the collective agreement which was orally extended to the remaining employees satisfies the requirement that a collective agreement must be in writing. The second issue is whether the agreement 'regulates terms and conditions of employment'[9] and therefore satisfies section 23 (3) and whether the applicant is entitled to change the shift patterns in accordance with the agreement..

[22] Regarding the first question, I am of the view that the extended agreement is not a collective agreement in respect of those of the second and further respondents other than those employed in the applicant's "truck and radial [tyre] department". The agreement in so far as they are concerned is not a collective agreement in that it is not a written agreement and accordingly does not alter their terms and conditions of employment. The determination of their shift patterns remains within the applicant's prerogative as a work practice. However even if I am wrong in this, the collective agreement, for the reasons set out below contractually entitles the applicant, after consulatation, to 'discontinue or modify' the shift pattern to 'achieve its operational requirements', and these employees are in the same position as are the employees in the applicant's "truck and radial [tyre] department"..

[9] Section 23 (1) (c) (i).

[23] Secondly, as regard the effect of the collective agreement on the terms and conditions of the employees in the applicant's "truck and radial [tyre] department", it is clear from the wording thereof that it was always the intention of the parties that it should regulate their terms and conditions of their employment.

[24] It is however necessary to consider the extent to which the agreement, which regulates the terms and conditions of employment of the employees employed in the applicant's "truck and radial [tyre] department", allows the applicant to change the shift patterns after consultation, specifically given the provisions of clause 12 of the agreement.

[25] This clause reads as follows:

> 'Operational Requirements
>
> In the event that demand for product declines, or that the 12-hour 3-shift system proves not to be cost effective, after consultation between the parties, Dunlop [applicant] will discontinue or modify the 3-shift system to achieve its operational requirements'[10]

[26] The term operational requirements is a term of art defined in the LRA as follows: 'operational requirements' means requirements based on the economic, technological, structural or similar needs of an employer;"[11]

[27] Having regard to the reasons advanced by the applicant for wanting to change the shift patterns it is clear that they fall squarely within the definition. Of operational requirements. This being so the applicant was required merely to consult prior to deciding to 'discontinue or modify' the shift system. This it has done.

[28] It is clear that unless specifically entrenched contractually, the right to regulate shift patterns is the prerogative of the employer. In light of the specific wording of clause 12 of the collective agreement, I am of the view that it does no more than entrench in the respondents' terms and condition of employment the

[10] Page 182 0f the indexed pleadings.
[11] Section 213 of the LRA

applicant's right to regulate shift patterns. The agreement specifically records the applicant's contractual right to, after consultation, to 'discontinue or modify' the shift system in order to 'achieve its operational requirements'. It is trite that consultation does not as a prerequisite require that the parties will agree. It simply requires that the applicant in this matter engage the respondents in consultation before it changes the shift pattern.

[29] I am therefore of the view that whilst the shift patterns which are the subject of the collective agreement are terms and conditions of employment in respect of the employees in the applicant's "truck and radial [tyre] department" so too does the collective agreement regulate the applicant's right to discontinue or modify these shift patterns to achieve its operational requirements.[12]. The import of this clause of the agreement is no more than a recordal of the applicant's right to change shift patterns, which are terms and conditions of employment, after consultation.

[30] In the circumstances, I am satisfied that in respect of those respondents other than those employed in the applicant's "truck and radial [tyre] department" the new shift patterns do not constitute a change to their terms and conditions of employment and that the applicant was entitled to change the shift patterns. Regarding those respondents employed in the "truck and radial [tyre] department" the applicant, by virtue of clause 12 of the collective agreement, was entitled to change the shift patterns despite the fact that they constituted terms and conditions of employment..

[31] Accordingly, the second and further respondents may not rely on the provisions of section 64(4) of the LRA and are required to tender their services in accordance with new shift patterns.

[32] This does not however preclude the respondents pursuing the dispute regarding the imposition of the new shift patterns as a dispute of interest in accordance with the provisions of section 64(1) of the LRA.

[12] See Section 23 (3) 'a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement".

[33] As regards costs it is just and equitable that no order be made regarding costs.

[34] I make the following order:

34.1 The new shift patterns set out in the annexure A to the applicant's application do not constitute a change to the terms and conditions of those of the second and further respondents who are not employed in the applicant's truck and radial [tyre] department;

34.2 Regarding those of the second and further respondents who are mployed in the applicant's truck and radial [tyre] department the applicant's change to the shift patterns was in accordance with the provisions of the collective agreement regulating their terms and conditions of employment;

34.3 The second and further respondents are interdicted from continuing with or participating in a strike concerning the implementation of the new shift patterns and are directed to tender their services in accordance with the new shift pattern unless and until they have complied with the provision of section 64(1) of the labour Relations Act.

34.4 There is no order as to costs.

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D H Gush

Judge

APPEARANCES

FOR THE APPLICANT:	Mr D Farrell
	Farrell Inc Attorneys
FOR THE FIRST AND FURTHER	
RESPONDENTS	Adv P Schuman
	Instructed by Brett Purdon Attorneys