THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable / not Reportable

Case no: JR657/2015

PUBLIC SERVANTS ASSOCIATION	**First Applicant**
NATIONAL UNION OF PUBLIC SERVICE AND ALLIED WORKERS	**Second Applicant**
NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION	**Third Applicant**

And

DEPARTMENT OF HOME AFFAIRS	**First Respondent**
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**Second Respondent**
PM NGAKO *N.O.*	**Third Respondent**

Heard: 7 August 2015

Delivered: 22 September 2015

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Summary: Review – commissioner incorrectly finding that bargaining council lacked jurisdiction because the dispute did not involve a matter of mutual interest – ruling set aside

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JUDGMENT

MYBURGH, AJ

Introduction

[1] This is an application to review and set aside a jurisdictional ruling issued by the third respondent ("the commissioner"). In his ruling, the commissioner found that the dispute referred to the second respondent ("the GPSSBC") by the first applicant ("the PSA"), the second applicant ("the NUPSAW") and the third applicant ("the NEHAWU") "is not a matter of mutual interest", and "consequently [that the] GPSSBC lacks jurisdiction in this matter".

[2] As dealt with further below, the alleged dispute of mutual interest referred by the applicant unions to the GPSSBC involved a change to the scheduling of working hours by the first respondent ("the department").

Statutory provisions

[3] There are two statutory provisions that were relied on by the department and the commissioner, which can be conveniently quoted at the outset. The first is section 7 of the BCEA,[1] which provides (under the heading "regulation of working time") as follows:

> "Every employer must regulate the working time of each employee-

[1] Basic Conditions of Employment Act 75 of 1997.

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(a) in accordance with the provisions of any Act governing occupational health and safety;

(b) with due regard to the health and safety of employees;

(c) with due regard to the Code of Good Practice on the Regulation of Working Time issued under section 87 (1) (a); and

(d) with due regard to the family responsibilities of employees."

[4] The second is regulation B of part VI of the Public Service Regulations,[2] which provides (under the heading "working hours") as follows:

"A head of department shall determine-

(a) the work week and daily hours of work for employees; and

(b) the opening and closing times of places of work under her or his control, taking into account-

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

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

Background to the jurisdictional ruling

[5] The background leading to the commissioner's jurisdictional ruling is not in dispute, and can be summarised as follows.

[6] On 6 February 2015, at a special Departmental Bargaining Chamber ("DBC") meeting, the department proposed certain changes to the scheduling of working hours ("the new model"). In the process, it adopted the position that the new model was up for consultation, but not collective bargaining. The unions were afforded an opportunity to consult with their members before responding.

[2] Public Service Regulations 2001, published under GN R1 in *GG* 21951 of 5 January 2001.

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[7] On 27 February 2015, at another special DBC meeting, the unions recorded their opposition to the new model, and adopted the position that the changes should form the subject of collective bargaining, and ultimately a collective agreement. The department, in turn, stuck to its position, and notified that it intended implementing the new model on 1 March 2015 – this in circumstances where it considered that it had duly consulted on the matter.

[8] A circular was subsequently issued by the department confirming that the new model would come into effect from 23 March 2015 ("the circular").

[9] On 13 March 2015, the PSA referred a dispute of mutual interest to the GPSSBC for conciliation. The PSA demanded in the referral that the circular be withdrawn, agreement be reached that changes to working hours would be the subject of negotiation between the parties, and that working hours be structured in such a fashion that every employee gets two days a week off.

[10] On 19 March 2015, the NEHAWU both withdrew an earlier section 64(4) dispute and referred a mutual interest dispute instead to the GPSSBC for conciliation. In its referral, the NEHAWU demanded the withdrawal of the circular, and that any changes to working hours be the subject of negotiation between the parties.

[11] The NUPSAW did not make a referral of its own, but appears to have made application to join as a party to the dispute before the GPSSBC, making common cause with the other unions.

[12] The dispute was set down for conciliation by the GPSSBC on 2 April 2015. On that day, the department raised a challenge to the jurisdiction of the GPSSBC – this on the basis that the dispute (allegedly) did not involve a matter of mutual interest. The commissioner determined this issue in his jurisdictional ruling (dated 8 April 2015) that forms the subject of this review application.

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The jurisdictional ruling

[13] The key part of the commissioner's *ratio decidendi* are paragraphs 15 and 16 of the jurisdictional ruling. They read as follows:

> "I also agree with the respondent that in terms of the above provisions, the employer has prerogative to regulate working hours. I was referred to *SA Police Union v National Commissioner of the SA Police Service & another* [2006] 1 BLLR 42 (LC) ["*SAPU*']. Murphy [AJ] … (as he then was) stated [at para 84]:[3]
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> > 'In short, it was not a term of the contract of employment that employees working twelve-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 time. 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.'
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> According to Acting Judge Murphy as he then was in *SAPU* above, shift changes is merely a work practice. In the matter before me the Minister has bestowed the prerogative on the head of department to determine working hours, which prerogative he may exercise in terms of the Public Service Regulation[s] Part VI (B) ['the regulation']. As a result taking into consideration Section 7 of the [BCEA], [the regulation] and the decision of Judge Murphy in *SAPU* … [t]he changes by the respondent in opening and closing [hours] are a work practice being subject to the employer's prerogative." (Own emphasis.)

[14] In the result, the commissioner ruled that the dispute referred to the GPSSBC "is not a matter of mutual interest", and "consequently [that the] GPSSBC lacks jurisdiction in this matter".

[3] I have corrected the quotation in line with the text of the BLLR.

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Grounds of review: evaluation and analysis

[15] To begin with, one might question the utility of this review application – this in the light of at least one judgment which held (in virtually identical circumstances) that, despite the existence of the jurisdictional ruling, the applicant unions would be entitled to strike after referring a dispute to conciliation and waiting out the 30-day conciliation period.[4] However, given that the applicant unions appear desirous of actually engaging in conciliation under the auspices of the GPSSBC with a view to resolving the dispute, I am persuaded that some purpose is served by this review application.

[16] Turning to the review test, it is well established that, when it comes to jurisdiction, the review test is correctness (not reasonableness or anything else).[5] It follows that the single issue in this matter is whether or not the commissioner was correct in finding that the dispute did not involve a matter of mutual interest – it being on this basis (and this basis alone) that he ruled that the GPSSBC lacked jurisdiction to conciliate the dispute.

[17] A matter of mutual interest is not defined in the LRA.[6] In the present matter, the controversy regarding the reach of the term stems from the fact that in the referrals for conciliation, the unions ticked the "matters of mutual interest" box, when asked to describe the nature of the dispute. In labour law parlance, what this means in practical terms is that the unions consider the dispute to be one over which a protected strike can be called. This in circumstances where one of the defining elements of a "strike" in section 213 of the LRA is that its purpose must be the remedying of a grievance or resolving a dispute in respect of "any *matter of mutual interest* between employer and employee" (own emphasis).

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[4] *City of Johannesburg Metropolitan Municipality & another v SAMWU & others* [2011] 7 BLLR 663 (LC).

[5] The LAC has handed down a long line of judgments to this effect, which can be traced back to *SA Rugby Players' Association (SARPA) & others v SA Rugby (Pty) Ltd & others; SA Rugby Pty Ltd v SARPU & another* [2008] 9 BLLR 845 (LAC) at para 41.

[6] Labour Relations Act 66 of 1995.

[18] There are many judgments in the strike context which have interpreted what a matter of mutual interest entails. For present purposes, there is no need to traverse them all. Recently, in *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of SA & others* (2014) 35 *ILJ* 3241 (LC) ("*Vanachem*") at para 17, Van Niekerk J provided this description of the reach of the phrase (which is consistent with a long line of authorities):

> "But the use of the term 'mutual interest' in the LRA is very different – it ultimately serves to define the legitimate scope of matters that may form the subject of collective agreements, matters which may be referred to the statutory dispute-resolution mechanisms, and matters which may legitimately form the subject of a strike or lock-out. In this sense, 'matters of mutual interest' serves to distinguish those disputes that concern the socio-economic interests of workers (see s 77, which permits protest action in support of such disputes) and what might be termed purely political disputes, for which the LRA does not afford any right to strike or lock-out. It is not necessary for present purposes to define the term 'matters of mutual interest' with any precision, but it seems to me that it requires, in broad terms, no more than that the issue that is the subject of any term of any collective agreement, referral for conciliation or the subject of any strike or lock-out be work related, or as the court put it in the *De Beers*[7] decision, it must concern the employment relationship." (Own emphasis.)

[19] In short, leaving aside purely political disputes and socio-economic disputes, all disputes that arise on the shop floor that concern the employment relationship constitute matters of mutual interest. This wide interpretation of the phrase is, of course, in keeping with the fact that constitutional rights (in this case, the right to strike) must be construed broadly.[8]

[20] As *Vanachem* also makes clear, included in the phrase "a matter of mutual interest" are *both* disputes of right and interest.[9] This is important because there is sometimes a misconception that a matter of mutual interest excludes

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[7] *De Beers Consolidated Mines Ltd v CCMA & others* [2000] 5 BLLR 578 (LC).

[8] *Vanachem* at para 18.

[9] See the quotation in para 18 above read with *Vanachem* at para 16.

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disputes of right. This is wrong and conflates the meaning of a strike and the substantive limitations on the right to strike. A strike over a dispute of right (being a matter of mutual interest) is still a strike as defined in the LRA, but it is prohibited because it is hit by the substantive limitation on the right to strike in section 65(1)(c) of the LRA.

[21] On the face of it, as Mr Orr (who appeared for the applicants) submitted, apart from wages, it is difficult to imagine a better example of a matter of mutual interest than a dispute about hours of work, and a change in the scheduling thereof.

[22] On what basis then did the commissioner find that the dispute is not about a matter of mutual interest? As appears from the quotation in paragraphs 13 and 14 above, this came about principally as a consequence of the commissioner's reliance on the judgment of Murphy AJ in *SAPU* in the present context – it having caused the commissioner to find that, in the present matter, a change in hours of work constitutes simply a change in "a work practice" which fell within the department's "prerogative", and thus did not constitute a matter of mutual interest.

[23] In our labour law, the relevance of something being a work practice is that the status *quo* provisions provided for in section 64(4) of the LRA (which sanctions an immediate retaliatory strike if the employer does not restore the status *quo*), are only applicable if the employer unilaterally effected a change to "terms and conditions of employment", as opposed to a non-contractual work practice.[10] Put differently, as a non-contractual work practice does not constitute a term and condition of employment and falls within the prerogative of management, changes to them do not trigger section 64(4).

[24] But in the present matter, reliance was not placed on section 64(4), with the result that whether the new model simply involved a change in a work

[10] See, for example, *Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU & others* [2011] 3 BLLR 231 (LC); *Unitrans Supply Chain Solutions (Pty) Ltd v SA Transport & Allied Workers Union & others* (2014) 35 *ILJ* 265 (LC).

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practice, which the department had the prerogative to effect, had no bearing on whether the dispute involved a matter of mutual interest. Work practices, and the exercise of management prerogative in their alteration, certainly concern the employment relationship, and fall within the wide definition of a matter of mutual interest espoused in *Vanachem.*

[25] In argument, in addition to defending the commissioner's reliance on *SAPU,* Mr Mokhari SC (who appeared for the department) also submitted that the applicants' members "cannot strike over the determination of working hours which is statutorily permissible" – this being a reference to the fact that the department (through its Director General) is permitted by both the BCEA and the Public Service Regulations to set working hours (see paragraphs 3 and 4 above). Mr Mokhari further submitted that the dispute "is a rights dispute that is subject to arbitration".

[26] To my mind, there is no merit in these submissions. Insofar as the department is permitted and has the prerogative to introduce the new model, this does not detract from the fact that it involves a matter of mutual interest. By way of analogy, in *Pikitup (SOC) Ltd v SAMWU obo members and others* [2014] 3 BLLR 217 (LAC), the LAC accepted that the employer was permitted to introduce breathalyser testing, but at the same time found that the dispute relating thereto involved a matter of mutual interest, over which a strike was permissible. In relation to the dispute of right contention, reference is made to paragraph 20 above. Even if the strike would be unprotected, this does not mean that it does not involve a matter of mutual interest, with the result that the GPSSBC's jurisdiction to conciliate would be unaffected by the protected nature (or otherwise) of the strike. Although I can find no basis upon which a strike over the new model would be unprotected,[11] it is thus strictly speaking unnecessary for me to decide the issue for present purposes, and I accordingly decline to do so.

[11] On the face of it, none of the limitations on the rights to strike provided for in section 65(1) and section 65(3) of the LRA are applicable.

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[27] In the result, I conclude that the commissioner was wrong in finding that the GPSSBC lacked jurisdiction to conciliate the dispute, with it flowing from this that the ruling is reviewable.

[28] Before turning to my order, I should mention that I do not consider an order as to costs to be appropriate in the circumstances of this matter. The parties have an ongoing relationship, and the department should not be held to blame for the fact that the commissioner's ruling is wrong and thus reviewable.

Order

[29] In the premises, the following order is made:

1. The jurisdictional ruling made by the third respondent is reviewed and set aside;

2. The second respondent is directed to enrol the dispute of mutual interest for conciliation by a commissioner other than the third respondent;

3. There is no order as to costs.

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Myburgh, *AJ*

Acting Judge of the Labour Court of South Africa

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APPEARANCES:

On behalf of the applicants: Adv C Orr (instructed by Bowman Gilfillan)

On behalf of the first respondent: Adv W Mokhari SC (instructed by the State Attorney)

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