Unlocking labour laws

Limits of managerial prerogative: real lesson of Apollo Tyres

While managers can use their discretion to change shifts at the workplace there are limits to how they can do this. **Heinrich Böhmke** looks at how this has played out in recent cases.

You are a union organiser preparing for a strike at a car manufacturer. The dispute concerns shift patterns, which the employer has unilaterally changed. Although the total number of hours worked each week remains the same, the difference between the old and new shift patterns is significant. Workers who never worked weekends must now do Saturday and Sunday shifts every so often. The beneficial, four-day long weekend that came up during the old shift cycle is also gone. The way workers have run their lives for years is overturned. Church, sport and the long-weekend visits of many to their family in the rural areas are disrupted. They are angry.

You believe this is a unilateral change to terms and conditions of employment. Management simply stuck the new shift patterns up on the notice board. Supervisors were told to discipline workers who did not report on the new working days. You wrote to management asking that they restore the old shift pattern. They refused. You initiated a dispute through the Commission for Conciliation Media and Arbitration (CCMA) demanding that the company restore the old shift while the dispute unfolded. They refused.

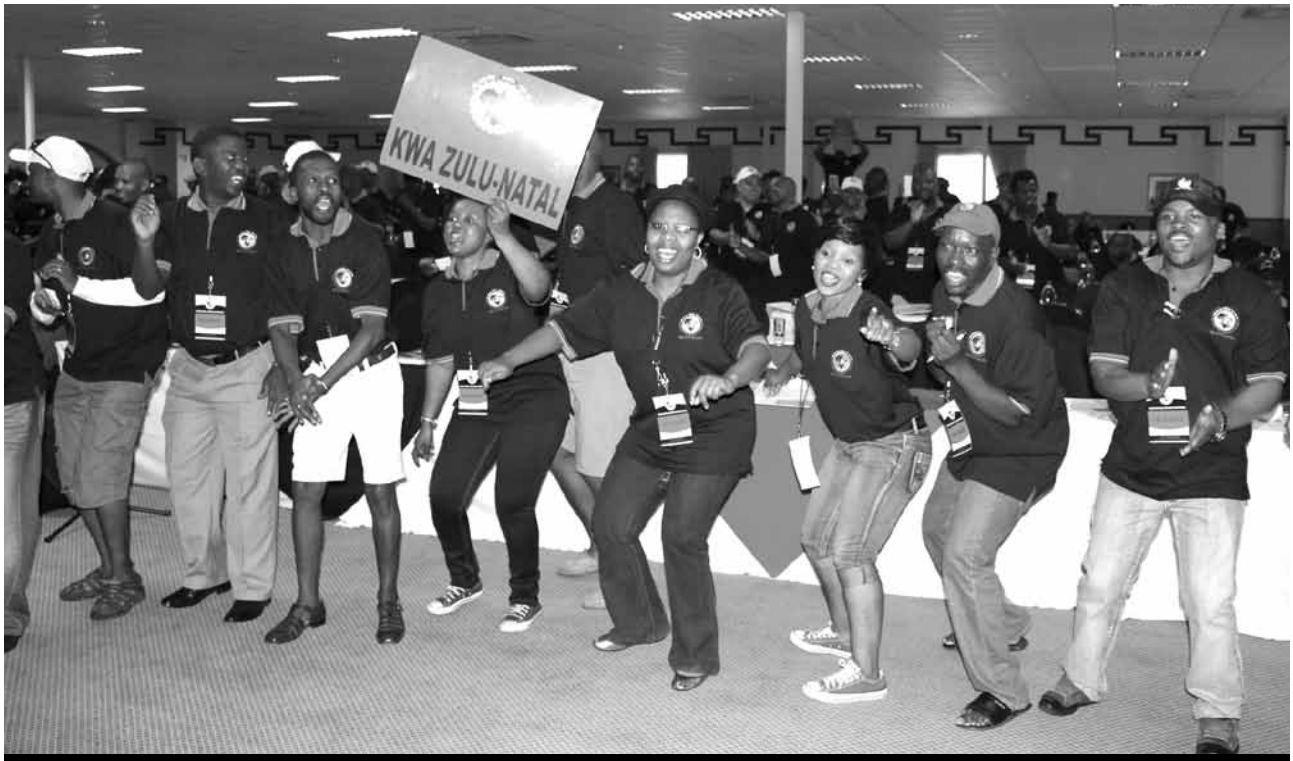
You have therefore triggered the strike provisions under section 64(4) of the Labour Relations Act (LRA) and given the company 48 hours notice of the strike.

It has been difficult consulting with the entire workforce but you are prepared for a mass walkout. Workers are raring to go. You feel you are on good ground because the employer is finalising a big export order and disruption of production over the next few days is likely to be acutely felt.

A day before the strike is to begin, the employer approaches the Labour Court for a declaratory order that the change to shift patterns did not constitute a change to terms and conditions. If so, this deprives the union of the right to strike. They give the union 24 hours notice of this application.

The company raises the argument that a shift pattern is not a term and condition of employment. It does not matter that workers must now work on Saturdays and Sundays or that the occasional, four-day weekend is gone. Shift patterns are merely a work practice that management has the prerogative to alter as they see fit. Workers will still work exactly the same amount of hours per month as they did before and get the same pay. What are they complaining about?

In raising managerial prerogative, the employer is essentially claiming that the regulation of shift patterns is akin to the allocation of offices to clerks or the assignment of cars to drivers. The employer must have the flexibility to swop around the way work is done when they need to.



Numsa shop stewards from KwaZulu-Natal at the Numsa Bargaining Conference in Pretoria. Numsa organises in the tyre sector.

You are taken aback by these arguments. You need to get hold of lawyers to oppose the application. The union bureaucracy authorising such an expense takes time to navigate. And the lawyers will have to draft affidavits and probably instruct counsel to argue the matter. Time is slipping away.

One option is not to oppose the interim order but, on the return date, to mount a proper and considered defense. The problem with this is that the strike will be interdicted in the mean time thus robbing workers of the valuable bargaining chip of the export order.

It is also unlikely all workers will be dissuaded from starting the strike. Some will go ahead anyway and then the union will spend months in disciplinary hearings for their violation of the court order. There are also some members who are ready to strike now but will take the interim order as a defeat. They might not come out in two weeks' time when a final order is hopefully granted in the union's favour.

The Labour Court recently reflected on some of these issues. In the *National Union of Metalworkers of South Africa Numsa obo its Members v Murray Roberts* (J1056/12) [2012] ZALCJHB 40 (10 May 2012), the court noted that Rule 8 of the Labour Court rules provides that if a party brings an urgent application, the affidavit in support of the application must contain reasons why urgent relief is necessary and if the application is brought on less than 48 hours notice, the reasons why a shorter period of notice should be permitted.

The court found that the rules thus strike a balance between the recognition that in some instances the application of the prescribed time limits (or any time limits at all) might occasion injustice and, on the other hand, the right of the respondent to a reasonable opportunity to be heard before any adverse decision is made against it.

THE COURT STATED:

'At stake is the ability of any respondent, including often trade unions themselves, to come before the Labour Court sufficiently advised and reasonably prepared to oppose the granting of relief, even if interim in nature, that could have a significant impact on its rights and interests. This is especially so in the arena of collective bargaining and power-play, where the interruption or delay of a strike or lock-out can have significant effects on its outcome.

Should orders be granted on less than 48 hours notice, without very good reasons being advanced, it may lead to a situation where a rule nisi issued from this court flows not from the merits of the application but from the administrative disadvantage the respondent suffered in not being able to mount a considered and proper defence under unreasonably

tight time-frames. It strikes me as being particularly important in the realm of collective labour law not to allow any party to obtain the upper hand in delaying the timing of industrial action through a weakly motivated deviation from set notice periods'.

This case has served to stiffen the Labour Court's resolve not to hear urgent applications brought without proper notice, unless compelling reasons are given. A certain laxness had crept in. In terms of our scenario, the opinion in *Murray and Roberts* might save the union in the very short term. However, should the employer cure the procedural defect, things look bleaker for the union.

In *Apollo Tyres South Africa (Pty) Ltd v Numsa & Others* [2012] 6 BLLR 544 (LC), a matter in which I was involved, the Labour Court found that shift patterns are indeed not 'terms and conditions of employment' unless they are incorporated into written contracts or collective agreements. If an employee is hired and happens to work a certain shift pattern, no matter how long or how settled it may seem, the employer may change this shift pattern in accordance with its needs. Good human resource practice would dictate that employees are first consulted on such a change. If they do not agree to the change, and as long as the overall amount of hours worked remains the same, the employer may impose themselves.

The caution is important to note. The court found that *unless specifically entrenched in a written contract or collective agreement*, the right to regulate shift patterns is a work practice that falls within the *prerogative* of the employer. This means that if the parties have expressly contracted that work will happen Monday to Friday, then the employer's discretion to require an employee to work over the weekend is absent.

The court cited *Johannesburg Metropolitan Bus Services (Pty) Ltd v SA Municipal Workers' Union & Others* [2011] 32 ILJ 1107 (LC) and *Ram Transport SA (Pty) Ltd v SA Transport and Allied Workers Union & Others* [2011] 32 ILJ 1722 (LC) in support of its reasoning.

The decisions in *Mauchle (Pty) Ltd t/a Precision Tools v National Union of Metal Workers of SA & Others* [1995] 16 ILJ 349 (LAC)*; SA Police Union v National Commissioner of the SAPS* 2005 (26) ILJ 2403 (LC) and *National Union of Metal Workers of SA on behalf of its members v Lumex Clipsal (Pty) Ltd* [2001] 22 ILJ 714 (LC) are also relevant.

It is worth noting that an adverse interdict ruling is not the end of a struggle in which workers are willing and able to exercise power. After the Labour Court found that the dispute did not concern a change by the employer to terms and conditions of employment thus permitting strike action, Numsa swapped legal horses. Instead of presenting itself as the injured party demanding the *status quo*, it went on the attack. Those familiar with the distinction in South African labour law between disputes of right and disputes of interest will appreciate the deftness of the move they made.

If, as the Labour Court stated, it was the employer's *right* to unilaterally alter shift patterns not recorded in contract, the new shift patterns were, correspondingly, a matter of mutual interest in respect of which the union could make demands. What one party may have as of right, another party may have an interest in changing. The LRA permits bargaining in interest disputes. If no agreement is reached, industrial action may be started.

Within hours of its defeat over the interdict, Numsa demanded that the company change its rightful, new shift pattern. The union undertook that workers would work to the new shift pattern in the interim but the union wanted something else in its place in future. What the union demanded looked a lot like the old shift pattern. The employer refused and the matter was referred to the CCMA for conciliation. When this failed, a certificate of non-resolution of the dispute was issued. About three weeks down the line, then, Numsa was in a position to embark on a protected strike in support of its demand for a change in the existing shift system. It was the one wanting change and it wanted a collective agreement to freeze the change it achieved, firmly and legally in place.

Worker support for this demand was overwhelming. The three weeks of working to the new shift pattern had given workers a taste of exactly what was in store for them, their families and their religious and sporting activities should the new shift system remain. Things had not been going so well under the new shift system for the company either. There was a lot of 'innocent confusion' about who had to report for work and when. Productivity was low. The law reports reflect the outcome of *Apollo* as a victory for the employer and its prerogatives. What the law reports do not mention is what happened after the gavel came down. Faced with the prospect of a long strike by a united and militant workforce, a mere three weeks after the court found in their favour, the employer agreed to reinstate the old, preferred shift system. In a sense it abandoned its legal victory and learnt the lesson that prerogative only extends as far as power permits. LB

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