REVISITING AN OLD FRIEND: WHAT CONSTITUTES "A MATTER OF MUTUAL INTEREST" IN RELATION TO A STRIKE? A TALE OF TWO RECENT CASES

Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members (2014) 35 *ILJ* 983 (LAC); and *Vanachem Vanadium Products (Pty) Ltd v National Union of Metal Workers of SA* Case No J 658/14

1 Introduction

The purpose of the Labour Relations Act 66 of 1995 (the LRA) is to advance economic development, social justice, labour peace and democratization of the workplace (s 1 of the LRA). The primary objects of the LRA, *inter alia,* include the following: "to provide a framework within which employees and their trade unions, employers and employer's organisations can (i) collectively bargain to determine wages, terms and conditions of employment, and other matters of mutual interest; and (ii) formulate industrial policy" (s 1(c)(i)–(ii) of the LRA), and "to promote orderly collective bargaining [and] (ii) collective bargaining at sectoral level" (s 1(d)(i)–(ii) of the LRA). The LRA in its purpose provision also makes provision for the advancement of the effective resolution of labour disputes and employee participation in decision-making in the workplace. Central to collective bargaining is the right to strike and the recourse to lock-out, respectively available to employees and employers. The collective-bargaining system has since 2007 become increasingly adversarial as "a decline in negotiating capacity, the re-emergence of non-workplace issues negotiations, and the rise of general mistrust between the parties" (National Planning Commission 2012 par 34) as the key factors contributing to the worsening of the collective bargaining is evident (Benjamin "Beyond Dispute Resolution: The Evolving Role of the Commission for Conciliation, Mediation & Arbitration" 2014 *ILJ* 1 3). The focus on strikes, has unfortunately, not been positive, as some industries have been plagued by violent, and/or unprotected and sometimes protected strike action that carries on for long periods of time. The focus of this case note is, however, not to look at the latter categories of strikes but rather to discuss a very contentious issue related to strike action: What constitutes mutual interest with reference to strikes? Two recent cases (*Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members*

(2014) 35 *ILJ* 983 (LAC); and *Vanachem Vanadium Products (Pty) Ltd v National Union of Metal Workers of SA* Case No J 658/14) will be evaluated against the backdrop of existing literature and case law on this issue.

2 The facts

2 1 The facts in the Pikitup case

The appellant company (Pikitup) provided waste-management services in the City of Johannesburg. The waste-management services included the collection of refuse from households and businesses. Pikitup employed over 250 drivers. Some of these drivers reported for work under the influence of alcohol, which forced Pikitup to introduce mandatory alcohol testing of its drivers and random testing of its other employees, like assistants to the drivers. The respondent union (SAMWU) and its members were unhappy about the mandatory breathalyser testing of drivers, and demanded that the new measures be prohibited. SAMWU gave notice to strike unless Pikitup scrapped the breathalyser tests. Pikitup approached the Labour Court (see *Pikitup (SOC) Ltd v SAMWU obo Members (1)* (2014) 35 *ILJ* 201 (LC)), which granted an interim order declaring the proposed strike by SAMWU unprotected, but later discharged the order on the return date in *Pikitup (SOC) Ltd v SAMWU obo Members (2)* (2014) 35 *ILJ* 224 (LC) (see also Grogan "Case Roundup: Latest judgments and awards" 2014 *Employment Law* 18 19 for the discussion of these cases). In the first stage, the Court (per Snyman AJ) found that the demand for cessation of breathalyser testing was not an unlawful demand, but that the decision to implement it fell within the operational management of the business. The Court added that it was not the subject-matter of legitimate and collective bargaining therefore granted an interim interdict prohibiting the strike. On the return date, the court (per Hulley AJ) discharged the rule nisi and disagreed with Snyman AJ and found it was a matter of mutual interest to both Pikitup and the employees. This brings us now to the appeal of the two issues before the Labour Appeal Court: whether the demand to abandon breathalyser testing was an unlawful demand and whether health and safety issues were matters of mutual interest.

2 2 The facts in the Vanachem case

The Vanachem issue deals in essence with an urgent application in which the applicant (Vanachem) seeks to interdict a strike called by the first respondent (NUMSA). Vanachem contends that the demands made by NUMSA (who represents the majority of the employees) on behalf of its members are not demands in support of a protected strike. On 5 December 2012, Vanachem and NUMSA concluded a "strike settlement agreement" where the parties agreed (as per clause 1) that all conditions of employment contained in annexure A to the agreement would be determined and based on the terms and conditions of the Metal and Engineering Industries

Bargaining Council (MEIBC) main agreement (the MEIBC is the bargaining council for the metal and engineering industry, and serves generally to regulate terms and conditions of employment in the industry). Clause 37(1) of the main agreement in effect establishes the bargaining council as "the sole forum for negotiating matters contained in the Main Agreement". The strike-settlement agreement concluded between Vanachem and NUMSA in December 2012 provides amongst other things, the following:

> "1.1 Linkage with the Main Agreement The parties agree that variation of all conditions of employment contained in Annexure A shall be determined and be based on the terms and conditions of the signed MEIBC Main Agreement Settlement Agreement. The above linkages shall be binding on the parties and remain in force until such time that the parties to the MEIBC have concluded the process of establishing the House Agreement Chamber which shall facilitate the incorporation of the House Agreements into the Main Agreement."

In May 2013, NUMSA submitted a number of demands to Vanachem, which Vanachem refused to accede to. The refusal of these demands became the subject of a referral of a dispute to the bargaining council. On 30 January 2014, the bargaining council issued a certificate that the dispute remained unresolved. There are five demands that Vanachem seeks to impugn in these proceedings and are as follows:

> "(a) The 'insourcing' of jobs previously outsourced (the demand is expressed in the following terms: 'We propose the employer in source or permanent jobs in the company e.g. HRM, House Keeping, Security and others');
> (b) That the employer 'should provide transport from and to work or home and pay it 100%';
> (c) The appointment of full-time shop stewards (one full-time shop steward, one full-time health and safety shop steward and 30 days' time off per shop steward per annum with unlimited time off for trade union office bearers);
> (d) Payment of a risk allowances, being a heat allowance, chemical allowance and dust allowance;
> (e) That the employer should train not less than five artisans per term."

Vanachem submitted that the disputes were regulated by the main agreement and strike-settlement agreement and thus not capable of being the subject of protected strike action. Vanachem also submitted that the subject of the demands did not constitute "matters of mutual interest" for the purposes of the definition of a "strike" in the LRA.

3 What constitutes "matters of mutual interest"?

3 1 General

Section 213 of the LRA defines a strike as:

> "'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, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory;"

From this definition it is clear a strike has three main elements, which are:

(a) A refusal to work: The refusal can be a partial or complete refusal; or retardation or obstruction of work. Voluntary or compulsory overtime work is included in the definition. In *Simba (Pty) Ltd v FAWU* ([1997] 5 BLLR 602 (LC)) the employees refused to work contrary to a collective agreement that did not comply with the Basic Conditions of Employment Act 75 of 1997 (BCEA). The Court held that the word "work" in the definition of a strike does not include illegal work and to "hold otherwise would be contrary to public policy and would sanction a contravention of the BCEA" (612).

(b) Collective action: There must also be a concerted refusal to work by employees. It is clear that an individual employee cannot go on a strike or be locked out from the workplace. "*Concerted refusal to work"* and the reference to persons clearly indicate that more than one person must be involved in the refusal to work. This was clearly indicated in *Schoeman v Samsung Electronics (Pty) Ltd* ([1997] 10 BLLR 1364 (LC) 1367), where the Labour Court held that an individual employee cannot strike and that a lock-out can also not be effected against a single employee. It is, however, possible for a single employer to lock out employees. Du Toit and Ronnie ("The Necessary Evolution of Strike Law" 2012 *Acta Juridica* 195 206) point out in this regard that, while "concerted refusal of work" may first appear consistent with the notion of a strike as collective action, "it is submitted that the limitation takes on a new significance in the context of the individualisation of employment and lack of organization which, …, may justify re-evaluation of the traditional approach". In this context it is important to take note of what the Court said in *NUM v CCMA* (2011 32 ILJ 2104 (LAC)), where it held as follows:

> "I find it difficult to accept the justification for this distinction between a collective refusal to work in response to a contractual breach by an employer and a collective refusal to work to place pressure to resolve a dispute. That is not in accordance with the section. Section 213 provides that '[t]he 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 … for the purpose of remedying a grievance' constitutes a strike. Whether affected employees can decide to cancel the contract pursuant to a breach by the employer or sue for damages is beside the point. The key issue is to classify whether, on its own, the refusal to work for whatever reason in order to remedy a grievance falls within the scope of the Act's regulation of a strike."

(c) The purpose of the strike: The strike must have a purpose, which is to remedy a grievance or resolving a dispute in respect of "a matter of mutual interest". In this regard it is important to determine what constitutes a "matter of mutual interest". It must, however, be noted that determining whether a grievance or dispute is indeed a matter of mutual interest, "is often complex" (Manamela "A Dispute in Respect of a Matter of Mutual Interest in Relation to a Strike: *City of Johannesburg Metropolitan Municipality v SAMWU"* 2012 *SA Merc LJ* 107*).*

It must therefore be reiterated that the LRA sets out to not only promote "*labour peace"* but also "*orderly collective bargaining*" and "*the effective resolution of labour disputes*" (s 1 of the LRA) (author's own emphasis). One of the aims of the LRA is providing "simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration". The CCMA was established for these purposes. It thus clear that the "right and concomitant duty to bargain collectively is enshrined in the LRA" and is "integral to a system that sets out to civilise the workplace, to provide for a fair distribution between wage and profits, keep the economy vibrant and contribute to the wider democratic order" (see especially Davis and Le Roux "Changing the Role of the Corporation: A Journey Away from Adversarialism" 2012 *Acta Juridica* 306 317 as well as where they refer to Thompson "Bargaining Over Business Imperatives: The Music of Spheres After *Fry's Metals*" 2006 *ILJ* 704 785). It is therefore important to stress that, when a demand is made by a trade union, that demand may not be unlawful and a trade union may not support a strike for such a demand (see *TSI Holdings (Pty) Ltd v NUMSA* [2006] 7 BLLR 631 (LAC)). It thus clear that for the purposes of the definition of a strike, therefore, "all that need be established as an objective fact is the allegation of a dispute, not its existence" (*City of Johannesburg Metropolitan Municipality v SAMWU* [2011] 7 BLLR 663 (LC) par 14).

Matters of mutual interest are not defined by the LRA and have been interpreted widely by the Courts. In *Pikitup,* for example, the Court (as per Musi AJA) agreed with the return judge (Hulley AJ) that the phrase "any matter of mutual interest" defies a precise definition because it is a phrase that is couched in very wide terms (par 45). In this regard the Labour Court in *De Beers Consolidated Mines Ltd v CCMA* ([2000] 5 BLLR 578 (LC) 581C) stated that the term "mutual interest" is not defined in the LRA and "must therefore be interpreted literally to mean any issue concerning employment", hence the fact that it has been given a wide interpretation (see also *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union (1)* 1997 *ILJ* 716 (LAC); and *Vanachem* par 10 in this regard). In *Rand Tyre and Accessories (Pty) Ltd v Industrial Council for the Motor Industry (Transvaal), Minister for Labour & Minister for Justice* (1941 TPD 108 115*)* it was said that matters of mutual interest can be defined as:

> "whatever can be fairly and reasonably regarded as calculated to promote the well-being of the trade concerned, must be of mutual interest to them; and there can be no justification for restricting in any way powers which the legislation has been at the greatest pains to frame in the widest possible language."

Van Niekerk J in *Vanachem* reiterated that an interpretation (in *Rand Tyres & Accessories* (*supra*)), which was adopted more than 70 years ago under the 1937 Industrial Conciliation Act remains influential, and is of particular significance to the present matter and especially the reference to "the well-being of the trade, must necessarily be viewed in its context, that is, a definition of competent bargaining topics for industrial councils. In terms of

the labour legislation that applied in South Africa for most of the 20th century, industries were conceived of as a class of productive work or manufacture; a collective enterprise in which employers and employees were associated (see *R v Sidersky* 1928 TPD 109). In this sense, "matters of mutual interest" means no more than what is of mutual advantage or benefit to employers and employees, and therefore for the industry as a whole" (par 10–11). The Court in *Vanachem* also stated that, initially at least, Courts afforded a wide definition to the term "matters of mutual interest" (see also *De Beers Consolidated Mines Ltd* (*supra*)); some emphasis was also placed on matters of mutual interest as matters calculated to promote the well-being of the trade concerned, and the notion of mutual interest as relating to the well-being of the enterprise found its strongest expression in *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport & Allied Workers Union of SA* (2009 *ILJ* 1099 (LC) (par 13)). In *Itumele Bus Lines* the Court, for example, was faced with the issue as to whether employees could strike in support of a demand for equity shareholding and held (after considering the definition of a strike in terms of s 213 of the LRA) that for a dispute to be brought within the ambit of the definition, it should be in respect of a matter of mutual interest. The Court in *Itumele Bus Lines* further held that "matters of mutual interest" was a broader or wider concept than "terms and of employment" and if a matter is not a "'term and condition of employment', it may still be capable of being brought within the ambit of the concept 'matters of mutual interest'" (1112g–h; and see also Botha and Morajane "Is a Demand for a Higher Percentage of Share Equity a Mutual Interest in Respect of which Employees May Embark on a Strike? 2011 TSAR 174–185 for a discussion of the *Itumele Bus Lines* case). In *Vanachem* the Court reiterated that, unlike all of its predecessors, the LRA does not employ the term "matters of mutual interest" in relation to the competencies of the now "bargaining councils" as it is employed in a very different context, ultimately to define the scope of collective bargaining under the Act, the statutory dispute-resolution system, and the scope of legitimate industrial action (par 12). It is thus clear that collective bargaining mainly focuses on setting terms and conditions of employment, and other matters of mutual interest between employers and employees (see Qotoyi and Van der Walt "Dismissals Within the Context of Collective Bargaining" 2009 *Obiter* 63 66; as well as Davis and Le Roux 2012 *Acta Juridica* 306 317 in this regard). It is, however, important to note that the protection of certain basic rights of employees in the promotion of the collective-bargaining model is essential (see discussion further below).

Although labour disputes are generally regarded as either being disputes of interest or disputes of right (this terminology is not found in the statutes, see further below) (Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@work* (2012) 430) it seems that "matters of mutual interest" are wide enough to include both these types of disputes. Van Niekerk *et al* are of the view that this classification "may be a convenient shorthand to distinguish respectively about the creation of new rights and disputes about the application of existing rights, but these labels may lead to confusion when

attempting to identify the nature of a particular dispute and its potential destinations under the dispute-resolution structure established by the LRA" (Van Niekerk *et al Law@work* 430). Section 213 of the *LRA* defines "dispute" to include an "alleged dispute" whereas "issue in dispute" in relation to a strike or lock-out, means "the demand, grievance, or dispute that forms the subject matter of the strike or lock-out." In *City of Johannesburg Metropolitan Municipality v SAMWU* (*supra*) the Court said with regard to the distinction between demand, grievance and dispute the following:

> "There are no bright lights between these categories. Sometimes the word 'demand' is used in a generic sense to refer to all three categories of strikes; sometimes it is used to refer to demands for higher wages. But these are not statutorily sanctioned requirements. The LRA refers only to a 'grievance' or a 'dispute'. There is thus no statutory requirement for the existence of a deadlock before a referral to either the CCMA or a bargaining council" (668E–G).

The Labour Court on several occasions had to consider the meaning of these concepts (*Sithole v Nogwaza NO* 1999 *ILJ* 2710 (LC) 2719 par 52). In *Gauteng Provinsiale Administrasie v Scheepers* (2000 *ILJ* 1305 (LAC) 1309J–1310A) the Court stated that disputes of right "concern the application or interpretation of existing rights". A dispute of right is concerned with a right or rights and therefore the origin thereof must be indicated, be it a statute, a collective agreement or a contract of employment. In *SA Democratic Teachers Union v Minister of Education* (2001 *ILJ* 2325 (LC) 2340E) the Court stated that the term "dispute of interest" has been described as "a term of art" and that, although it is widely used in labour relations, "it has never been precisely defined but the term generally is well understood". In *HOSPERSA v Northern Cape Provincial Administration* (2000 *ILJ* 1066 (LAC) 1070D–H) the Court held the following view:

> "A dispute of interest should be dealt with in terms of collective bargaining structures and is therefore not arbitrable. A dispute of interest should not be allowed to be arbitrated … under the pretext that it is a dispute of right. To do so would possibly result in each individual employee theoretically cloaking himself or herself with precisely the same description of the dispute that is the true subject matter of collective bargaining. And if such an individual employee could legitimately insist on his or her particular case being separately adjudicated, whether through arbitration or otherwise, the result would inevitably be a fundamental subversion of the collective bargaining process itself. … If individuals can properly secure orders that have the effect of determining the evaluation of differing interests on the merits thereof, then the distinction between disputes of interest and disputes of right would be distorted and the collective bargaining process self-evidently would become undermined."

Against this backdrop it is worthy to take note of *Pikitup*, where the court was also of the view that the phrase is extremely wide, "potentially encompassing issues of employment in general, not merely matters pertaining to wages and conditions of service", and who correctly in the view of the Court concludes that "the best one can say, therefore, is that any matter which affects employees in the workplace, however indirectly, falls within the scope of the phrase "matters of mutual interest" and may

accordingly form the subject matter of strike action" (par 55–56). A dispute of mutual interest generally refers "to proposals for the creation of new rights or the diminution of existing rights" which are ordinarily to be resolved by collective bargaining (see the *Gauteng Provinsiale Administrasie supra* 1309J–1310A). These matters, *inter alia,* include issues relating to terms and conditions of employment like employee remuneration, service benefits and compensation. Disputes concerning mutual interests can include issues such as higher wages, improved conditions of employment or a change to an existing collective agreement (Davis and Le Roux 2012 *Acta Juridica* 317). In *Durban City Council v Minister of Labour* (1948 1 SA 220 (N) 226) the Court held that the term "matter of mutual interest" cannot be without limitation because if it was unlimited the result would often be absurd. It has also been said that a "matter of mutual interest" is one in which the trade union and employer have a material and simultaneous interest and must be related to the employment relationship between employee and employer. It must also be an issue that can be reduced to or regulated by a collective agreement (Mischke "What are 'Matters of Mutual Interest'?" 2001 *Contemporary Labour Law* 89). For example, the transfer of employees in terms of section 197 of the LRA is a matter of mutual interest "as bargaining collectively is to secure rights or to protect them when they are threatened by dismissal for operational requirements". Some matters of mutual interest are channelled through resolution by means of industrial action, whereas others are resolved through adjudication (*University of the Witwatersrand Johannesburg v Commissioner Hutchinson* 2001 *ILJ* 2496 (LC) 2499 par 7–8). It therefore appears that disputes of right are resolved by way of arbitration and adjudication. Disputes arising from "matters of mutual interest" are regarded as disputes of interest and are normally resolved by collective bargaining (Qotoyi and Van der Walt 2009 *Obiter* 66). Matters of mutual interest can therefore also include health and safety issues, dismissal of workers, the negotiation of disciplinary and retrenchment procedures (Mischke 2001 *Contemporary Labour Law* 89). An important determining factor is whether such a matter can be dealt with through collective bargaining, and it will not include political issues or demands against the State except if the State is acting as employer (Mischke 2001 *Contemporary Labour Law* 89; as well as Manamela 2012 *SA Merc LJ* 111).

3 2 Back to the Vanachem and Pikitup cases

In order to determine which issues fall within matters of mutual interests regard must be given of the Courts' thought processes in both cases.

The applicant in *Vanachem*, for example, contended that, in order for a matter to be a matter of mutual interest, it must necessarily have the following characteristics: (a) it must relate to the employment relationship between the employer and employee; (b) it must create new, or destroy existing rights in the employment relationship; and (c) it must be a matter in the interest of both employer and employee, and must concern the common good of the enterprise. The applicant submits that this approach and in

particular, the application of (c), places the interests of the enterprise as separate (though contingent) and additional to the interests of both employer and employee. "Mutual interest" on this basis must necessarily account for the well-being of the enterprise. Van Niekerk J, adds that this approach is fundamentally flawed first, as far as the proposition contained in (b) is concerned, the applicant (as well as the court, in *Itumele Bus Lines*) confuses disputes about matters of mutual interest and interest disputes as it "is clear from the statutory framework that all interest disputes (broadly, disputes about the creation of new rights) and rights disputes (broadly, disputes about the interpretation and application of existing rights) are subsets in the broader category of disputes about matters of mutual interest. In other words, all interest disputes constitute disputes about matters of mutual interest, but not all disputes about matters of mutual interest are interest disputes" (par 15–16). The Court then made an important observation regarding the proposition in (c), that is relating to the common good of the enterprise (which is drawn ultimately from the *Rand Tyres* judgment) as follows:

> "It should be recalled that that judgment concerned no more than a list of legitimate bargaining topics for industrial councils, with 'matters of mutual interest' being a catch-all, thus serving an expansive rather than a restrictive purpose. 'Mutual interest' in this sense may well refer to the well-being of the industry, given the purpose for which the term was employed. 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* decision (*supra*), it must concern the employment relationship" (par 17).

The Court in *Vanachem* in its rejection of another argument put forward by the applicant stated that there is a more fundamental reason why the interpretation of the term "matters of mutual interest" preferred by the applicant cannot be sustained:

> "What the applicant seeks to do, by extrapolating the reference to the common good in the *Rand Tyres* decision into the term 'matters of mutual interest,' is to subject every demand made in the collective bargaining process by trade union (and indeed, by any employer or employers' organisation) to utilitarian analysis. It would require the court to apply a form of Bentham's felicific calculus, to determine what might constitute the greatest good for the greatest number. What this approach overlooks, at a basic level, is that the LRA acknowledges that the interests of parties to an employment relationship more often than not stand in conflict, and that the preferred mechanism to reconcile competing interests is the process of collective bargaining. In a voluntarist system such as that established by the LRA, the courts have no role in determining the merits of any demand made during the bargaining

> process, nor are they empowered to make any value judgment as to whether a demand promotes or secures the common good of the enterprise. The court is empowered to intervene if and only if a demand made in support of a strike or lock-out if any industrial action does not comply with the substantive and procedural limitations established by the Act. In other words, the court is concerned only with the lawfulness of demands in a strict sense, and can make no judgment as to their merits or consequences" (par 19).

In context of whether the trade union in *Vanachem* could embark on strike action, and regarding whether the issues *in casu* where in fact "matters of mutual interest" it is important to take note of what the Court said with reference to the demands made by the union:

(i) the demand for insourcing, where the union seeks to reverse the process of outsourcing and to reinstate those services previously provided on an in-house basis, on that basis is a matter that is work-related, and therefore a matter of mutual interest (par 20);

(ii) the demand for transport costs is one that would require the applicant to meet the actual costs of travelling incurred by employees to and from work on a daily basis, and has been increased and remains an element of the employees' remuneration packages. The union is therefore precluded from striking in support of its demand for the payment of travelling costs (par 21);

(iii) the demand for the appointment of shop stewards. Section 65 of the LRA does not preclude the union from raising a demand for the appointment of full-time shop stewards or from striking in support of a demand (par 22);

(iv) the demand for the payment of risk allowances in the form of heat, chemical and dust allowances does not relate to any matters that are dealt with either in the main agreement or the strike settlement agreement, and thus the demands clearly concern a matter of mutual interest and in the union can raise these demands or call a strike in support of them (par 23); and

(v) the union's demand for the training of artisans, is also not a matter that is regulated by the main agreement or the strike-settlement agreement and thus is a matter of mutual interest and therefore a matter that may form the subject of a protected strike (par 24).

The Court in *Vanachem* also added that this interpretation is sustained by statutory imperatives in relation to the interpretation of the LRA and in particular, those of its provisions that concern fundamental rights. The Court then added that the interpretation of "matters of mutual interest" that was put forward by the applicant ignores entirely the provisions of the Constitution and the statutory injunction contained in section 3 of the LRA that any person applying the Act must interpret its provisions to give effect to its primary objects, in compliance with the Constitution and in compliance with public international-law obligations (par 18). In this regard it is also important to look at the *Pikitup* case. The Court in *Pikitup* pointed out that there was in fact a problem with some of the appellant's employees who reported for duty

or drove its vehicles whilst they were under the influence of alcohol. The Court added that there was no evidence that indicated that the problem of driving under the influence is so pervasive that breathalyser testing had to be implemented without having regard to the rights of employees, or without negotiating with the trade union. The Court also noted that there is no indication that proper consideration was given to the right to privacy of the employees. This, the Court added, is important with reference to *Communications, Energy & Paperworkers Union of Canada v Irving Pulp & Paper Lt*d the Supreme Court of Canada said the following:

> "49 On the other side of the balance was the employees' right to privacy. The board accepted that breathalyser testing 'effects a significant inroad' on privacy 'involving coercion and restriction on movement. Upon pain of significant punishment, the employee must go promptly to the breathalyser station and D must co-operate in the provision of breath samples … Taking its results together, the scheme effects a loss of liberty and personal autonomy. These are at the heart of the right on privacy'.
>
> 50 That conclusion is unassailable. Early in the life of the Canadian Charter of Rights and Freedoms, this Court recognized that 'the use of a person's E body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity …'. And in *R v Shoker* 2006 SCC 44, [2006] 2 S.C.R. 399 it notably drew no distinction between drug and alcohol testing by urine, blood or breath sample concluding that the 'seizure of bodily samples is highly intrusive'."

The Court in *Pikitup* also stressed that there is no reason as to why the position should be different in South Africa, as rights to human dignity, privacy, freedom of movement and bodily integrity are entrenched in our Constitution and thus an employee's consent is required before "such an invasive and intrusive act can be required from him/her" (par 63).

3 3 Limitations to the right to strike and "matters of mutual interest"

Although the right to strike is recognized by the Constitution of the Republic of South Africa, 1996 in section 23(2) it is not absolute because it may be limited under certain circumstances. This limitation firstly applies to only industrial action called by a trade union, in support of a demand related to the bargaining process or matters of mutual interest being recognized as a "strike" (see discussion earlier). The LRA also imposes a number of substantive and procedural limitations on the right to strike (Strikes and lock-outs are dealt with in Chapter IV of the LRA; see also the Labour Appeal Court's judgment in this regard in C*WIU v Plascon Decorative (Inland) (Pty) Ltd* [1998] 12 BLLR 1191 (LAC) par 7). The recourse to lock employees out from the workplace is, on the other hand, only recognized by the LRA, but it does not mean that the status or protection thereof is lesser or weaker than the right to strike. This sentiment was illustrated in the Constitutional Court's judgment in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* (1996 (4) SA 744 (CC) par 65), where the court held that

> "the effect of including the right to strike does not diminish the right of employers to engage in collective bargaining, nor does it weaken their right to exercise economic power against workers. The right to bargain collectively is expressly recognised by the text ..."

Yacoob ADCJ, (in his majority judgment) in *SATAWU v Moloto* (2012 (6) SA 249 (CC) par 85), for example, noted the importance of the right to strike as follows:

> "the right to strike, rooted in collective bargaining, is premised on the need to introduce greater balance in the relations between employers and employees, where employers have the greater social and economic power".

In *Vanachem*, for example, the Court, with reference to *NUMSA v Bader Bop (Pty) Ltd* ([2003] 2 BLLR 103 (CC)), raised an important issue. It reiterated that the Constitutional Court has held that, where the LRA is capable of an interpretation that does not limit fundamental rights, that interpretation should be preferred (see, eg, *South African Police Service v Police and Prison's Civil Rights Union* 2011 (6) SA 1 (CC), where the Court confirmed that an important purpose of the LRA is to give effect to the right to strike and that the process of interpretation is important in order to give effect to the purpose "so as to avoid impermissibly limiting the right to strike" (par 30)). The Court also confirmed the fundamental rights' status of the right to strike (as discussed above) and made the following important comments regarding limitations and interpretation:

> "It is well-established that the provisions of the Act (and in particular, sections 64 and 65, which impose limitations on the right to strike) must be interpreted and applied in a manner which gives best effect to the primary objects of the LRA and its defined purposes. It is equally well-established that where any provision of the LRA is capable of mutually contradictory interpretations, the court should adopt an interpretation that promotes the purposes of the Act, in this instance, orderly collective bargaining and the effective resolution of labour disputes. Given that a necessary element of any strike must be the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, the definition afforded to the term 'mutual interest', in effect, defines the scope of the right to strike. The broader the interpretation, the broader the scope of legitimate strike action. Conversely, were a narrow interpretation to be afforded the term, the scope of right to strike would be accordingly attenuated. For present purposes, an interpretation that gives effect to the Bill of Rights and to the purposes of the LRA requires that 'matters of mutual interest' would serve to exclude those matters that are purely political in nature, or which more properly concern the socio-economic interests of workers" (par 18).

An evaluation of section 65(1)(c) of the LRA thus becomes relevant here. It should be noted in this context that the current version of section 65(1)(c) of the LRA excludes the right to strike where "the issue in dispute is one that a party has the right to refer to arbitration or to the labour court in terms of this Act" (meaning a "dispute of right"). Du Toit and Ronnie pointed out that this prohibition (prior to the proposed 2012 amendments to the LRA)) is "consistent with the Interim Constitution, in terms of which the LRA had been drafted, which had confined the right to strike to 'the purposes of collective bargaining'" (Du Toit and Ronnie 2012 *Acta Juridica* 208). They add that the

reasons for excluding the right to strike in the case of disputes of right are well known:

> "Despite this, the LRA goes on to create two exceptions where representative trade unions are allowed a choice between strike action and arbitration or litigation. This suggests, at the very least, that the possibility of industrial action as a deadlock-breaking mechanism should be considered in a contextual manner rather than dividing disputes into rigid categories where the right to strike is permitted, prohibited or, in terms of s 77, attenuated. It is pertinent to consider that litigation may under certain circumstances be excessively costly, time-consuming or impractical, even when workers have the law on their side, thus depriving them of remedies, and claims thus frustrated may well re-emerge later with renewed intensity. It is therefore suggested that the limitations placed on the right to strike where legal remedies are available, or in socio-economic disputes, should be more nuanced, building on the reasoning reflected in ss 21 and 189A of the LRA with a view to promoting 'effective' dispute resolution rather than industrial peace as an end in itself" (Du Toit and Ronnie 2012 *Acta Juridica* 208).

The proposed amendment to section 65(1)(c) of the LRA is now extended to disputes that may be referred for adjudication or arbitration in terms of the LRA or any *other employment law*. This includes not only the Unemployment Insurance Act 63 of 2001, the Skills Development Act 97 of 1998, the Employment Equity Act 55 of 1998, the Occupational Health and Safety Act 85 of 1993, the Compensation for Occupational Injury and Diseases Act 130 of 1993, the Unemployment Insurance Contributions Act 4 of 2002, as well as regulations issues regulated by the BCEA (during the first year of the determination) (see Grogan "The New Dispensation, Part 1: The amendments to the LRA" 2014 *Employment Law* 3 8; as well as The Labour Relations Amendment Bill 2014). This amendment clearly overrides the judgment in *Mawethu Civils (Pty) Ltd v National Union of Mineworkers* (2013 34 *ILJ* 2624 (LC)), where the Court held that section 65(1)(c) (as currently contained in the LRA) is confined "to those matters which may be referred for adjudication or arbitration under the LRA. Actions in furtherance of a strike that contravenes the BCEA now constitute offences" (see Grogan 2014 *Employment Law* 8). Clause 7 of the Bill makes it clear that the amendment to section 65 of the LRA is made in order to eliminate the anomalous distinction between disputes that can be adjudicated under the Act in respect of which industrial action is currently restricted and those under other employment laws in respect of which there is no equivalent restriction (Memorandum of objects on Labour Relations Amendment Bill, 2012). In this regard it is important to take note of what the Court in *Pikitup*: although health and safety responsibilities falls predominantly the shoulders of the employer that it is clear from the Occupational Health and Safety Act (OHSA) that employees also bear duties and responsibilities towards other employees and members of the public. The Court stressed the fact that employers may not always have all the solutions to health and safety issues at the workplace, and that employees may have "the necessary knowledge and experience of a risk, how it affects or may affect them and/or others and how to avoid it" (par 58). The Court in *Pikitup* then referred to the OHSA and added that the term "reasonably practicable" is the "touchstone in the OHSA"

which demands that various interests be considered as well as a cost-benefit analysis be done and thus the whole scheme of the OHSA points to a need for employers and employees to work together, in order to ensure the health and safety of everybody" (par 58). The role of the employer is to at least consider the minimum that can be done in order to satisfy the reasonably practicable requirement, whilst employees, "who are at the coalface, might want more to be done" (par 58). One of the underpinnings of the OHSA is the cooperation between employer and employees which, if viewed through "the prism of shared duties and responsibilities which can in most cases only be achieved if the employees consent and buy-in to the measures" (par 64). The Court then stressed that it does not exclude collective bargaining and thus the provisions of the OHSA are compatible with collective bargaining and health and safety issues are matters of mutual interest. The Court added (as pointed out earlier) that the constitutional rights of the employees were infringed without their consent and in the Court's view, it "represents a substantial change". Employees will be entitled to embark on strike action in order to resolve the dispute over health and safety issues if no agreement can be reached between them (par 65–67).

3 4 The relevance of section 187(1)(c) of the LRA

Another important issue with reference to "matters of mutual interest" is the provision that can be found in section 187(1)(c) of the LRA. The current version of 187(1)(c) of the LRA forbids the dismissal of employees in order *to compel* them to accept a demand in respect of any mutual-interest matter between the employer and employees as it would automatically result in unfair dismissal, nor can an employer unilaterally change the terms and conditions of employment without consulting the trade unions. The proposed amendment to section 187(1)(c) provides that a dismissal is automatically unfair if the reason is *a refusal by employees* to accept a demand in respect of any matter of mutual interest between them and their employer. The amended version makes a refusal by employees to accept a demand relating to a matter of mutual interest automatically unfair "if the dismissal takes *place in consequence* of such a refusal" (see Grogan 2014 *Employment Law* 5). Although this change may seem small, it is, however, quite significant (Grogan 2014 *Employment Law* 5–6) in light of *CWIU v Algorax (Pty Ltd)* ([2003] 11 BLLR 1081 (LAC) and *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA* (2003 *ILJ* 133 (LAC)) (Grogan 2014 *Employment Law* 5–6). In *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA* the court held as follows:

> "A lock-out dismissal entails that the employer wants his existing employees to agree to a change of their terms and conditions of employment. In a lock-out dismissal the employer would take the attitude that, if the employees do not agree to the proposed changes, he would dismiss them – not for operational requirements – but to compel them to agree to the change. In such a case the employees thereafter have the opportunity to agree to the change. When they agree to the change, the dismissal ceases because it has served its purpose. If the employees do not agree to the change after they have been dismissed for the purpose of compelling them to agree, the

> employer dismisses them finally. The last mentioned dismissal is not a lock-out dismissal. It is an ordinary dismissal for operational requirements" (146G–147A).

The crucial difference between the original 187(1)(c) and the proposed amendment is "that it is no longer a requirement for automatic unfairness that the reason for dismissal is the employer's intention to compel the acceptance of the demand" (DLA Cliffe Dekker Hofmeyer Employment: Guide to the Amendments 2014 wwww.cliffedekkerhofmeyer.com 1 3) and thus the employer's intention is "now removed from the equation" and the dismissals in *Fry's Metals* and *Algorax* would have been automatically unfair (Grogan 2014 *Employment Law* 6). Clause 31 of the Bill makes it clear that the proposed amendment seeks in 187(1)(c) to give effect to the intention of the provision as enacted in the LRA in 1995 "which is to preclude the dismissal of employees where the reason for the dismissal is their refusal to accept a demand by the employer over a matter of mutual interest" and is intended to protect the integrity of the process of collective bargaining under the Act, and is consistent with the purposes of the Act" (Memorandum of objects on Labour Relations Amendment Bill, 2012).

4 Concluding remarks

From this discussion it remains clear that the fact that no definition of what constitutes a "matter of mutual interest" is still left largely to the circumstances and facts of each individual case and the Court's interpretation. In both *Pikitup* and *Vanachem* the Courts reiterated the fact that a wide interpretation should be applied. From the discussion above it is also clear that matters of mutual interest can include health and safety issues as well as demands for insourcing, payment of risk allowances, training of artisans, to mention only a few. It is clear that these demands must not only be lawful but also must be of mutual advantage or benefit to the employer and its employees. An approach that favours the common good of the enterprise cannot be utilized. What can be done is to apply an approach where matters of mutual interest concern the employment relationship or exclude disputes concerning socio-economic interests of workers, or purely political disputes. It is, however, also possible for demands of a socio-economic or political nature to be linked to the workplace (see *Government of the Western Cape Province v COSATU* [1998] 12 BLLR 1286 (LC) as well as Grogan "Of mutual interest: When are strikes permissible?" 2014 *Employment Law* 3 9). Employers, however, do not have *carte blanche* when they determine what is regarded as a legitimate issue or falls within the meaning of "matters of mutual interest". It appears that the Courts are left with the power to decide which issues are legitimate or illegitimate. Although health and safety responsibilities fall on an employer, such an employer cannot unilaterally implement changes to policies, for example a breathalyser test (see *Pikitup* in this regard). Such an employer should consult the trade union and the employees regarding proposed changes as these changes could have an impact on employees' rights to privacy, dignity, freedom of movement and

bodily integrity which could be invasive and intrusive. It must also be remembered that an employer would still be able to exercise its managerial prerogative regarding the so-called "operational-management issues".

It also appears that issues that would previously have fallen within the ambit of section 65(1)*(c)* of the LRA, and would have had to be referred previously to adjudication or arbitration in terms of the LRA, are now also changed by the proposed amendment to now include any other employment law such as the UIA, SDA, EEA, OHSA, COIDA, UISA and BCEA. It is, however, now clear from the decision in *Vanachem* that matters of mutual interest and interest disputes must not be confused with each other because it

> "is clear from the statutory framework that all interest disputes (broadly, disputes about the creation of new rights) and rights disputes (broadly, disputes about the interpretation and application of existing rights) are subsets in the broader category of disputes about matters of mutual interest. In other words, all interest disputes constitute disputes about matters of mutual interest, but not all disputes about matters of mutual interest are interest disputes" (par 15–16).

In closing it must be mentioned that the LRA creates a statutory dispute-resolution system and a framework for collective bargaining in which the parties to the employment relationship, if there is a grievance or dispute or an alleged dispute, must utilize in order to embark on strike action or enforce existing rights or create new rights. It does not make a difference whether the dispute is an interest or right dispute. What matters is the fact that the law grants protection and recognition to how the dispute is resolved and how the parties to the dispute ultimately behave. It is thus clear from the discussion above that demands regarding "matters of mutual interest" will depend on the circumstances of each case as well as the determination as to whether the demands are legitimate or not.

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