

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – MTHATHA**

**NOT REPORATBLE
Case No: CA 14/2022**

In the matter between:

**KING SABATA DALINDYEBO MUNICIPALITY
EMPLOYEES (K.S.D) – ACCESS CONTROL OFFICERS** Appellant

and

KING SABATA DALINDYEBO LOCAL MUNICIPALITY (K.S.D) Respondent

JUDGMENT

MAKAULA J:

A. Background:

[1] This appeal is against the judgment of the court *a quo* which dismissed an application brought by the appellants for a declaratory order that the failure by the respondent to account and pay the appellants for overtime worked during the period December 2014 to May 2015 was unlawful. The appellants further sought an order compelling the respondent to furnish them with the written account relating to the overtime worked during the same period and the applicable overtime rate. The appeal is with the leave of the court *a quo*.

B. Appellants' case:

[2] The appellants describe themselves as the King Sabata Dalindyebo Municipality Employees – Access Control Officers and employees of the respondent. Their relationship is governed by contracts of employment which, I presume, have similar provisions. The relevant clauses are 14 and 16 which provide:

“The Municipality could expect and you would be obliged to work overtime as dictated by work exigencies and/or as required by the Municipality subject to

the Municipality's policies on overtime. Stand-by Night work, Sunday work and Public Holiday work allowances are payable at a rate prescribed by council to employees who ordinarily work night shifts, or who work ordinarily on Sundays or Public Holidays and or whose duties require that they be on standby".

[3] During the period December 2014 to May 2015, the appellants state that they were requested by the respondent to work overtime. They worked the required hours stipulated in the respondent's policy which terms are consistent with their respective agreements. Thereafter, the appellants submitted their claims from time to time. The respondent failed to pay them after numerous requests from the appellant's representatives. The response was that the respondent had no money to pay for the overtime worked. However, after some time the appellants were uniformly paid an amount of R12 000.00 each with a concomitant deduction of R6000.00. No breakdown was given of the amount paid and for the deduction despite numerous enquiries.

[4] The appellants allege that they incessantly visited the officials of the respondent, including the Human Resources Department for clarity, accountability and transparency on the amount each employee was entitled to for the overtime worked and needed an explanation about the R6000.00 deduction. The contention by the appellants is that the respondent had not only failed to fully pay them but also failed to account to them.

[5] The appellant's pinned their application on the provisions of sections 10, 32 32(3)(a), 33(1)(g) and 35 of the Basic Conditions of the Employment Act 75 of 1997 (BCEA) and section 195 of the Constitution of the Republic of South Africa 106 of 1996 (the Constitution).

C. The respondent's case:

[6] The respondent contends that the appellants have been fully paid (as per their salary slips) what was due in terms of the overtime worked and has accounted on how the calculation was made. Furthermore, the contention is that Mrs Nwabisa Qhayiso – Giwu, the Manager Expenditure, explained fully to the appellants' representatives how the calculation was made and the rate applicable. The respondent argues that if

the appellants sought the respondent to furnish them with the written information relating to the overtime worked, they should have followed the procedures prescribed by the Promotion of Access to Information Act 2 of 2002 (PAIA) and were so advised by Mrs Qhayiso - Giwu. Furthermore, the respondent argues that the appellants failed to exhaust the internal remedies within the respondent's establishment in terms of the Municipal Systems Act 32 of 2002 the provisions of which allow the Municipal Council to overturn a decision by the Municipal Manager. In essence, the respondents do not dispute that the appellants are entitled to the calculation and the abatement of their overtime account.

D. The issue:

[7] The issue as crystallised in the founding and replying affidavit is that the appellants seek the respondent to account to them and if there is money due, then in that event, it be paid to the appellants¹.

[8] It is necessary to emphasise the long established principle that a litigant stands or falls by the case presented in the application papers. A claim that is before court is a matter of fact. Once a claim of a particular nature is presented in the papers then the court must deal with it accordingly. It is not open to the opponent nor the court to disregard the claim asserted in the papers and deal or decide the matter on a different basis. It is wrong to engage in '*an alchemical process*' that purports to convert the claim asserted into a claim of another kind².

E. Analysis:

[9] The cause of action asserted by the appellant is based on contract as stated in paragraph 2 above. The appellants required the respondent to account and debate to them. The object of a claim for an account and debate is to enable the appellants to establish the indebtedness of the respondent to them. The application is for the delivery of an account, a debate, and payment of the amount found to be due, if any. A final

¹ Even the court *a quo* correctly identified the issue as follows:

"The issue for determination is whether the applicants have made out a case for the relief sought, that being, furnished with the accounting of the amount due, for the overtime work they performed. Furthermore, whether they are entitled to an order for payments, in respect of the said overtime duties, by the respondent".

² *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA); [2009] 8 BLLR 721 (SCA); [2009] 4 All SA 146 (SCA) at paras 71 and 72.

order cannot issue before, debatement³. Harms JA in *Doyle and Another vs Fleet Motors P.E. (Pty) Ltd*⁴ formulated the following allegations that the plaintiff must prove in order to establish his right to accounting and debatement.

- “(a) his right to receive an account, and the basis of such right, whether by contract or by fiduciary relationship or otherwise;
- (b) any contractual terms or circumstances having a bearing on the amount sought; and
- (c) defendant’s failure to render an account”.

[10] The appellants pertinently raised the allegation that the respondent has failed to render an account to them after there had been requests both verbally and in writing. In the relevant parts the letter dated 26 March 2020 written by the appellants read:

“The municipality has always been promising to calculate, account and pay our clients for the overtime they have worked. We place on record that you do not only have a statutory duty to furnish that b(sic) written information but also a contractual duty to do so”.

[11] This fact has not been gainsaid by the respondent. Instead it, through Mrs Qhayiso – Giwu, the respondent advised the appellants to launch review proceedings either in terms PAIA or Rule 53 of the Uniform Rules of Court.

[12] Reliance on PAIA by the respondent as an instrument to get the information is misplaced. I further, do not, for the purposes hereof venture into the provisions of the BCEA and the Constitution referred to by the appellants for the reason that the ratio of the court *a quo* does not hinge on them. Furthermore, their cause of action is premised on a contract.

[13] The court *a quo* relied in its reasoning on the provisions of section 9 and 86(2) of the PAIA⁵. The court *a quo* further found that “the appellants had been asked to

³ Amler’s Precedents of Pleadings: Harms 9th Edition at page 13 and the case referred therein.

⁴ 1971 (3) SA 760 (A), 1971 (3) All SA 550 (A).

⁵ It reasoned as follows:

meet a simple requirement, to have the request reduced into writing. I found no justification for them to start with court proceedings, in those circumstances, even on the bases of BCEA”.

[14] With respect what the court *a quo* eventually found to be the reason for the dismissal of the application, does not find application in PAIA. The cause of action has been succinctly dealt with by the appellants as state above. All the appellants had to allege and prove is the basis of their entitlement to receive an account and that the respondent has failed to render a proper account and debatement to their request⁶. The appellants have satisfied those requirements,

[15] In *casu*, based on the contract between the parties, the respondent is obliged in law to furnish the appellants with a proper account on how the overtime was calculated and the debatement of that account. As aforesaid, the appellants pertinently referred to clauses 14 and 16 of the contracts between them. The respondents therefore have a contractual obligation to render an account to the appellants regarding how the amount of R12 000.00 has been calculated and debated especially that an amount of R6000.00 was universally deducted from all the appellants. On that basis, the appeal stands to be upheld.

[16] Regarding costs, there is no reason why the costs should not follow the result.

[17] Consequently, the following order shall issue.

“The order of the court *a quo* is set aside and substituted with the following order:

1. The respondent is ordered to render to the applicant within 60 calendar days from the date of this judgment a true and proper

“24. In my view, the appellants could have employed PAIA. Alternatively, each individual could have requested her or his information, as it is regarded as confidential and even safer so, request in writing, as Mrs Qhayiso – Giwu advised.

25. I do not agree that a court application is onerous than completion of the form required in section 18 of PAIA. Section 9(d) of PAIA state as much that PAIA enables access records, swiftly, inexpensively and effortlessly, as reasonable possible. The court process on the other hand takes long, it is expensive and requires more effort”.

⁶ *Doyle Ibid and Nusca vs Nusca* 1995 (3) All SA 104 (T); 1995 (4) SA 813 (T) page 817 para e-j.

statement of account together with substantiating documents reflecting the correct calculation and the rate applicable in its calculation of the overtime worked.

2. The respondent is ordered to debate the account with the applicants or their representatives within 10 court days from the date it was rendered in terms of paragraph 1 above.
3. The respondents are ordered to pay the costs of the application and the costs of appeal.

M MAKAULA
Judge of the High Court

Malusi J: I agree.

T MALUSI
Judge of the High Court

Govindjee J: I agree.

A GOVINDJEE
Judge of the High Court

Appearances:

For the appellant:

Mr AS Zono
Mthatha

Instructed by:

A.S. Zono & Associates
Mthatha

For the respondent:

Mr L Malala
Mthatha

Instructed by:

Mvuzo Notyesi Inc

Mthatha

Date reserved:

14 November 2022

Date delivered:

13 December 2022