

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

CASE NO. 855/2020

Date heard: 26 November
2020
Date delivered: 24 February
2021

In the matter between:

NONTANDABUZO FLY

Applicant

and

KING SABATA DALINDYEBO

LOCAL MUNICIPALITY (K.S.D)

Respondent

JUDGMENT

RUGUNANAN, J

[1] The short shrift approach to this matter is that in motion proceedings an applicant must stand or fall by their founding affidavit.¹ The point taken by

¹ In *Director of Hospital Services v Mistry* 1979 (1) SA 626 (AD) at 635H-636B, the Appellate Division held:

“When . . . proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in *Pountas’ Trustees v Lahanas* 1924 WLD 67 at 68 and as has been said in many other cases:

‘. . . an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny.’ ”

the respondent is that the applicant has failed to set out a cause of action for the relief claimed in her notice of motion. The dispute between the parties emanates from the applicant's employment with the respondent. She pursues a contractual remedy for restoration of her employment rights and a statutory remedy under sections 33 and 34 of the Basic Conditions of Employment Act² (hereinafter "the Act") to be "informed" of her employment conditions pertaining to working hours, overtime, night shift, Sundays and public holidays.³

- [2] In summary, the founding affidavit discloses that the applicant commenced employment on 20 June 2014 as an Access Control Officer in the respondent's Community Safety Department. The terms and conditions of her service are set out in a letter of appointment dated 23 June 2014 (hereinafter "the agreement").⁴ Emanating from the agreement, the applicant alleges, are rights in respect of a monthly rental allowance, overtime work, night work, Sunday work, and public holiday work - the benefits of which she alleges the respondent unlawfully withdrew during July 2019. She presently still holds the same position since date of appointment albeit without being beneficially remunerated for those rights.
- [3] In substance, the founding affidavit, goes no further than alleging that the respondent acted without consulting her and did so unlawfully, unconstitutionally, and in conflict with its "Human Resources Management Policies and Procedures". Nothing further is said about identifying this document, particularly its status and relevance to the applicant's employment agreement. Despite merely referring to its italicised title, the applicant did not undertake to make this document available to the court, nor did she ensure that the court file included a copy.

See also *Jozistat (Pty) Ltd v Topaz Sky Trading 217 (Pty) Ltd and another* (2011/29988) [2011] ZAGPJHC 91 (17 August 2011)

² Basic Conditions of Employment Act, 1997 (Act 75 of 1997)

³ Founding affidavit para 3 read with para 11

⁴ Founding Affidavit, Annexure "A", p12. Sections 33 and 34 respectively deal with "Information about remuneration" and "Deductions and other acts concerning remuneration".

[4] In her notice of motion the relief which the applicant seeks, in addition to being awarded costs, is composed in the following terms:

- “(1) That the respondent’s withdrawal of applicant’s rights to work overtime, night work, Sunday work, public holiday work and right to rental allowances and denial of benefits consequent upon those rights be and is hereby declared unlawful and accordingly set aside.
- (2) That the respondent’s failure to provide applicant with written information relating (sic) applicant’s number of ordinary, Sunday, public holiday and overtime hours, the rate at which the overtime is paid, and clear definition of applicant’s rights and benefits be and is hereby declared unlawful and accordingly set aside.
- (3) That the respondent be and is hereby directed to forthwith re-instate applicants right to work overtime, night work, Sunday work, public holiday (sic), rental allowance and all benefits associated with those rights.
- (4) That the respondent be and is hereby directed to forthwith provide the applicant with written information relating to applicant’s number of ordinary, Sunday, public holiday, and overtime hours, the rate at which the overtime is paid and a clear definition of applicant’s rights and benefits associated with the right aforesaid.”

[5] In opposition to the case put up by the applicant, the respondent relies on the the Act and the applicant’s employment agreement.

[6] Section 7 of the Act deals with regulation of working time. Where relevant for present purposes, it states:

“Every employer must regulate the working time of each employee-

- (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) ...;
- (d)”

[7] In the main opposing affidavit by the Municipal Manager of the respondent, Ngamla Pakade, the respondent denies that it withdrew the applicant’s employment rights. The applicant’s erstwhile attorneys presented the respondent with a medical certificate from her medical practitioner. Due to the applicant’s health condition, the certificate advised that she was not fit to

work night shifts and long hours in cold conditions. It recommended that she be accommodated on light duties until she became fit and recovered from her medical condition. Following receipt of the certificate, the respondent assessed the applicant and approved the recommendation that she be placed on light duties.

- [8] A supporting affidavit by the Director of the respondent's Department of Public Safety and Traffic Management, Dial Kettledas, confirms that he received and perused the applicant's medical certificate, that he undertook the assessment of her, that he approved the recommendation for her placement on light duty, that he informed her thereof and advised her that she will receive benefits and allowances commensurate with light duty, and that she understood and accepted the position without objection or subsequent complaint about the adjustment of the scope of her work, and that discharged her duties in keeping with the scope of work required of light duty.

- [9] The applicant's assignment of light duty came into effect on 1 July 2019. She was required to work Mondays to Fridays from 08h00 to 17h00 in the respondent's call centre. She was not required to work overtime beyond 17h00 on the specified days. Although not referring to the call centre, the extract of the respondent's attendance register⁵ for the period July to September 2019 indicates that the applicant was employed strictly in accordance with those hours.

- [10] James Xoseka, deposed to a further supporting affidavit on behalf of the respondent. He is a supervisor in the same department as the previous deponent. He states that he supervised the applicant's duties with effect from August 2019. He knows her personally and is related to her. Moreover, she never complained to him about an alleged withdrawal of her employment rights. During the initial period of the national lockdown in 2020 the applicant did not report for work. He visited her at her home and upon

⁵ Opposing affidavit, Annexure "NP1" p56 *et seq*

enquiring why she did not report for duty, she informed him that she was not an essential service employee.

[11] The respondent maintains that the applicant has to date not provided it with medical proof that she has recovered from her medical condition and is fit for reinstatement to her former position. For this reason this court is precluded from reviewing the decision taken by the respondent to place the applicant on light duty. Until such time as the applicant has provided the requisite medical proof the *status quo ante* cannot be restored. Consequently, the stance adopted by the respondent is that the applicant is not entitled to receive benefits and allowances associated with and flowing from working night shifts, public holidays, Sundays and overtime as in her former position prior to 1 July 2019. In the circumstances the respondent denies that it acted unlawfully and that the applicant has been disentitled as she alleges.

[12] In reply, the applicant denies the version of the respondent.

[13] In heads of argument, applicant's counsel attached a series of pages purporting to be extracts from the respondent's "Human Resources Management Policies and Procedures". Their content refers variously to provisions regulating allowances and payment for work on Sundays and public holidays. I am unable to ascertain if these are unadulterated pages extracted from a document generated by the municipality. Apart from being uncertified, the pages are undated, offering no indication of when the document from which they were extracted came into existence. The complete document was not tendered for perusal or filed of record. A court should not be confronted by oblique references to material concealed in unidentified documents annexed to heads of argument where no proper reference is made to such material in an applicant's papers.

[14] In the circumstances, the matter must be approached by recourse to the express provisions contained in the applicant's employment agreement.

Before doing so it is useful to identify the principle of interpretation applicable to the clauses mentioned hereunder. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁶ the Supreme Court of Appeal expressed the current state of the law with regard to the interpretation of written instruments as follows:

“Interpretation is the process of attributing meaning to the words used in a document be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the language of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one that they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in the context of having regard to the purpose of the provision in the background to the preparation and production of the document.”

(my own
underlining)

Working on Sundays, night shift and public holidays

[15] Clause 5 of the applicant’s agreement stipulates:

“Your working hours shall be from Mondays to Thursdays (8) hours per day from 08h00 to 13h00 and 13h45 to 17h00 and on Fridays from 08h00 to 13h00 and 13h45 to 16h00, which hours you are expected to observe minutely and any absence during these hours shall first be approved by your Head of Department or any official delegated by the Head of Department. Working days and hours of employees who work shifts are as determined by their departments in line with duty rosters prepared for that purpose.”

⁶ 2012 (4) SA 593 (SCA) at paragraph [18]

[16] The specific provision makes no mention of working at night, or on Sundays or public holidays. A plain reading of the relevant clause indicates that there is no obligation on the respondent, as employer, to place the applicant on duty on any of these days. There is accordingly no legally enforceable contractual obligation imposed on the respondent to do so.

Overtime

[17] In clause 14 of the agreement it is stated that:

“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 policy on overtime.”

[18] Quoting only where relevant, section 10 of the Basic Conditions of Employment Act states:

- “(1) Subject to this chapter, an employer may not require or permit an employee to work-
 - (a) overtime except in accordance with an agreement;
- (2) ...
- (3) ...
- (4) ...
- (5) An agreement concluded in terms of subsection (1) with an employee when the employee commences employment, or during the first three months of employment lapses after one year.”

[19] When read together with clause 5, clause 14 indicates that the applicant ordinarily does not work overtime. Once again there does not appear to be a legal obligation on the respondent to place the applicant on overtime, since this is dictated by work exigencies. Section 10 of the Act creates neither a right favouring an employee nor an obligation on an employer to allow an employee to work overtime. This must necessarily be done in terms of an agreement which lapses after the period mentioned in subsection 5.

Rental allowance

[20] A rental allowance of R984.65 per month is specifically incorporated in clause 17 of the employment agreement. In its replying papers, the respondent's stance is that the applicant is not automatically eligible to receive this allowance and other associated benefits. She is only entitled to receive allowances and benefits associated with light duty. Having been placed on light duty, the applicant does not qualify for the allowance and she is not eligible to receive it as she did in her former employment capacity.⁷ The extant position is that her work allowances and benefits are limited to the present scope of her work because of her health condition, and at her own instance.⁸

[21] Applying the prescript in the *Endumeni* case *supra*, the employment agreement indicates that the rights for which the applicant seeks restoration do not accrue to her. To hold otherwise would be tantamount to making a contract for the parties other than the one they in fact made.

Request for information

[22] The applicant does not state for what period the information is requested. It is common cause that prior to 1 July 2019 she received all her benefits and allowances including remuneration for overtime *etc.*, commensurate with the level of the position to which she was initially appointed. Although she disputes being placed on light duty, her papers reflect that since 1 July 2019 she has not worked overtime, nor on Sundays or public holidays. It is mystifying to conceive of the basis on which information should be made available subsequent to the period 1 July 2019, assuming that is what the applicant requires. The period over which the specific relief is claimed in paragraph 4 of the notice of motion has not been set out. In this light of this

⁷ Respondent's additional heads of argument para 11

⁸ Opposing affidavit para 10.3

obscurity, the Act does not assist her. Accordingly, the relief in paragraph 4 of the notice of motion, framed as obscurely as it is, is unenforceable. It is trite that relief claimed which is incapable of enforcement should be refused.⁹

[23] Apart from the imprecision in formulating her relief based on statutory grounds, the applicant has plainly not been able to establish rights flowing from her employment agreement. It follows that the founding affidavit does not make out a cause of action.

[24] There are, of course, other legal principles which may be employed to this kind of dispute.

[25] An applicant who seeks final relief on motion must, in the event of a conflict of facts, accept the version set up by the respondent unless the respondent's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.¹⁰ In the present case there is undoubtedly a material dispute of fact between the parties. It follows that unless I find that the respondent's allegations are so far-fetched or clearly untenable that I am justified in rejecting them merely on the papers, or unless the applicant's has requested to refer the matter for the hearing of oral evidence, which she has not, the application must fail.

[26] Did the facts put up by the respondent in its opposing affidavit and supporting affidavits raise a real and *bona fide* dispute of fact? In my view they clearly did. The applicant's allegations were contested by serious and unambiguous averments, and not merely by virtue of bald denials. Although no medical certificate of the applicant was attached to the respondent's

⁹ *Mansell v Mansell* 1953 (3) SA 716 (NPD) at 721E

¹⁰ *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at para [12] citing *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C and *Ripoll-Dausa v Middleton NO & Others* 2005 (3) SA 141 (C) at 151A-153C; See also *Fikile Makaula and Others v Zulu Royal Family of Ncapayi Kamadzikane Kazulu and 17 Others*, Unreported Mthatha Case No. CA 85/2015, paras 47-50

papers, or any proof that an assessment was conducted of her medical condition by the respondent, the question that remains to be answered is whether the respondent's averments are so far-fetched and uncreditworthy that they can be rejected out of hand. In my view there are clearly not, and it is extremely naïve of the applicant to expect the respondent to have attached her medical certificate to its opposing papers. Whatever the reasons for this document not being attached, it seems to me rather that confidentiality should not be thrown to the wind. I recognise that the truth in most instances lies "beyond mere linguistic determination"¹¹ but applying the above prescripts, it is doubtful if officials of the respondent would conspire to concoct the version presented on the respondent's affidavits. The respondent acted in accordance with the Act when it placed the applicant on light duty in recognition of her medical condition. She has to date not furnished medical proof that she has recovered from her medical condition and is fit for reinstatement to her former position. It is demonstrably manifest that the respondent's version cannot be regarded as fictitious or so far-fetched or untenable that it warrants rejection. And it is in my view similarly manifest that the applicant must have anticipated that her claim would be robustly contested by the respondent. The applicant's bare assertion that she was placed on light duty by the respondent without rhyme or reason must have clearly foreshadowed the extensive disputes of fact introduced by the respondent's opposing and supporting affidavits.

[27] There can be little doubt that the applicant must have anticipated those disputes of fact, and absent an application for the matter to be referred for oral evidence, I am constrained to decide the matter on the respondent's version.

[28] In the circumstances the following order issues:

"The application is dismissed with costs."

¹¹ As articulated by Heher JA in *Wightman supra* at 375D

S. RUGUNANAN
JUDGE OF THE HIGH COURT

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This judgment was handed down electronically by circulation to the abovementioned legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 09h30 on Wednesday 24 February 2021.

