

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 3735/2006

In the case between:

S VAN SCHOOR AND 22 OTHERS

Applicants

and

MR. MINNIE

1st Respondent

(in his capacity as the Fire Chief of
the Matjhabeng Municipality)

MR. LEETO

2nd Respondent

(in his capacity as the Acting Executive
Manager: Public Safety and Transport
of the Matjhabeng Municipality)

**THE MUNICIPAL MANAGER OF THE
MATJHABENG MUNICIPALITY**

3rd Respondent

THE MATJHABENG MUNICIPALITY

4th Respondent

JUDGMENT:

VAN DER MERWE, J

HEARD ON:

19 OCTOBER 2006

DELIVERED ON:

23 NOVEMBER 2006

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- [1] The applicants are station officers and firemen employed by the fourth respondent in its fire brigade department. The fourth respondent's fire brigade department has fire stations at Welkom, Odendaalsrus, Virginia and Hennenman. The

applicants are presently stationed at Welkom, Odendaalsrus and Virginia respectively.

[2] The first respondent is the chief of the fire brigade department of the fourth respondent. The second respondent is the acting executive manager: public safety and transport of the fourth respondent and the third respondent is the municipal manager of the fourth respondent. The fourth respondent is a local municipality established in terms of section 12 of the Local Government: Municipal Structures Act, No. 117 of 1998 with legal personality in terms of section 2 of the Local Government: Municipal Systems Act, No. 32 of 2000. It appears that it would have been quite sufficient and proper to cite only the fourth respondent as a party hereto, but it is not necessary to decide whether it was necessary or proper to join the first three respondents as parties hereto.

[3] At the hearing counsel for the applicants limited the substantial relief claimed by the applicants to a temporary

interdict, pending the final adjudication of an action for specific performance of the employment contracts entered into between each of the applicants and the fourth respondent to be instituted within 30 days of the order, in the following terms:

⁺gThat respondents be interdicted from varying applicants' conditions of service unilaterally by -

1. implementing a four shift system from **1 September 2006** as anticipated;
2. reshuffling applicants' shifts whereby they are required to work from different fire stations from **1 September 2006**;
3. insisting that applicants' overtime hours be reduced from 80 to 40 hours per month,.."

[4] It is clear from the papers that the case of each of the applicants is based on contract. Each applicant avers that the fourth respondent does not comply with alleged terms of the employment contract between each of the applicants and the fourth respondent and that therefore the applicants are entitled to an interim interdict preventing the fourth respondent from unilaterally varying the terms of contract, pending an action for specific performance by the fourth

respondent of the terms of contract.

- [5] It was submitted on behalf on the respondents that the jurisdiction of this Court to adjudicate upon the application is excluded and that the matter falls within the exclusive jurisdiction of the Labour Court. In the light of the foregoing, this submission must fail. Neither a dispute about the unilateral change of terms of an employment contract nor a claim for specific performance of the terms of an employment contract, are in my judgment matters that are to be determined by the Labour Court in terms of section 157(1) of the Labour Relations Act, No. 66 of 1995. See in this regard **FEDLIFE ASSURANCE LTD v WOLFAARDT** 2002 (1) SA 49 (SCA) at 61, **FREDERICKS AND OTHERS v MEC FOR EDUCATION AND TRAINING, EASTERN CAPE, AND OTHERS** 2002 (2) SA 693 (CC) at 712 to 714 and **MONYELA AND OTHERS v BRUCE JACOBS trading as LW CONSTRUCTION** (1998) 19 ILJ 75 (LC) at 83I to 84A. I also do not think that these disputes are matters in terms of the Basic Conditions of Employment Act, Nr. 75 of

1907, as envisaged by section 77(1) thereof. Whether this Court has jurisdiction must be determined on the applicants' case and in my judgment the applicants do not claim or rely upon any right created or granted to them in terms of Act No. 75 of 1997.

- [6] It is common cause between the parties that over the past number of years, the fourth respondent employed a three shift system in respect of the personnel at its four fire stations (according to the applicants this system has been in use since 1999, whilst according to the respondents this was the position since approximately October 2002, but nothing turns on this). In terms of the three shift system the personnel at the particular fire station were divided into three groups or shifts. Each shift was on duty for an uninterrupted period of 12 hours. This means that in every 24 hours, two shifts were on duty for 12 hours each, whilst the third was off duty in order to rest. The last three hours of every 12 hour shift was regarded and remunerated as overtime duty. This system resulted in 80 hours per month overtime on average

for the fire station personnel. However, 44 hours thereof only was the result of the three shift system itself. The overtime over and above the 44 hours overtime per month, was caused by the absence of personnel on leave for vacation or because of illness or whatever reason. Therefore, if all the personnel of a particular fire station were on duty for a whole month, each employee at that station would work overtime for 44 hours per month as a result of the three shift system. In accordance with this system employees were stationed at a particular fire station and not rotated between fire stations.

- [7] It is also common cause that the fourth respondent intends to change the three shift system to a four shift system and to rotate the personnel between the different fire stations on a three month basis. The applicants say that the fourth respondent took a decision to implement this new system from 1 September 2006. This is denied by the respondents who say that the four shift system cannot be implemented until additional personnel are employed and that the process

of employment of additional personnel has not yet been finalised. There are indications that the applicants are correct in this regard, but it is similarly unnecessary to determine this dispute as it is common cause that the fourth respondent intends to implement the new system in the near future. In terms of the four shift system, the personnel at the particular fire station will be divided into four groups or shifts, each doing duty for 8 hours uninterrupted at a time. In every period of 24 hours therefore, three shifts would be on duty for 8 hours each, whilst the fourth shift would be off-duty to rest. In terms of the four shift system there would be no overtime as a result of the system itself. The parties are however *ad idem* that approximately 40 hours overtime duty per month per employee would in terms of the new system still be done and paid for as a result of absence of personnel on leave as stated above. In terms of the new system, the personnel would be rotated between the four fire stations under the jurisdiction of the fourth respondent. The main purpose hereof is to familiarise all the fire station personnel with the whole of the area of jurisdiction of the fourth

respondent, in order to minimise reaction time of the fire brigade department in case of a substantial fire or other emergency.

- [8] I must say that my understanding of the applicants' case is that they are not in principle opposed to the reduction of the working hours in terms of the four shift system, but that their real objections are to the effect of the new system on overtime payment and to the rotation system. Be that as it may, the question for decision is whether the applicants have proved *prima facie*, even though open to some doubt, that the employment contract of each of the applicants with the fourth respondent includes, as contractual terms, that each applicant is entitled to work for 12 hours at a time on a three shift system, is entitled to work and be paid for overtime of 80 hours per month on average and is entitled to do duty only at the particular fire station where the particular applicant is stationed. As these averments are disputed by the respondents, the accepted test for a *prima facie* right or case in the context of an interim interdict is to take the facts

averred by the applicants, together with such facts set out by the respondents that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicants should on those facts obtain final relieve at the trial of the action. The facts set up in contradiction by the respondents should then be considered and, if serious doubt is thrown upon the case of the applicants, they cannot succeed. See **SIMON NO v AIR OPERATIONS OF EUROPE AB AND OTHERS** 1999 (1) SA 217 (SCA) at 228 G – H. What the applicants have to prove *prima facie*, even though open to some doubt on the aforesaid test in this case, is that the fourth respondent is bound to the aforesaid alleged contractual terms (“the alleged terms”).

- [9] From the outset and throughout the papers, the applicants relied on the alleged terms and therefore that the fourth respondent in implementing the new system has or would unilaterally amend their respective employment contracts with the fourth respondent. However, the applicants adduced no evidence as to how and when and under which

circumstances the alleged terms were agreed upon between each of the applicants and the fourth respondent or its legal predecessor or as to how, when and under which circumstances the terms became part of there respective employment contracts with the fourth respondent. On the contrary, it is common cause that each applicant was appointed by the fourth respondent or its legal predecessor in terms of a written letter of appointment. Examples of these letters of appointment form part of the papers, including the letter of appointment in terms of which the first applicant was appointed by the legal predecessor of the fourth respondent during 1993. These letters state that the particular applicant is appointed

“g... onderworpe aan die Raad se Diensvoorwaardes en verdere voorwaardes soos hierna uiteengesit:”

In each letter of appointment only the following is then stated in respect of what is relevant in this case:

“gWerkweek: sesdag werkweek
Werktye: Skofte”.

The letters of appointment do not mention a particular fire station where the employee would be entitled to do duty or where the employer would be obliged to allow the employee to do duty. In several instances it further appears that the 12 hour three shift system was on applicants' version introduced after the particular applicant became an employee of the first respondent or his legal predecessor, in some cases many years later. *Prima facie* therefore the letters of appointment constituting the relevant written contracts of employment, exclude the alleged terms relied on by the applicants. Put differently, on the averments of the applicant taken together with the undisputed facts put forward by the respondents, the applicants will not prove the alleged terms at the trial.

[10] There are also further reasons why in my judgment, there is on the totality of the evidence at least serious doubt and not only some doubt, as to whether the alleged terms are tacit terms of the employment contracts. In my view it does not appear to be a necessary inference that the alleged terms form part of the employment contracts. There appear to be substantial reasons why the fourth respondent or its predecessor would not bind itself as the applicants would have it. It seems to me that flexibility and adaptability in respect of the duty of emergency personnel such as the applicants, lie at the heart of the provision of emergency

services and that therefor an employer such as the fourth respondent would not relinquish the power to change the hours and circumstances of duty of emergency personnel. At the very least I am satisfied that to a question by the so-called officious bystander at any time when the employment contract of any of the applicants was negotiated, as to whether the alleged terms form part of the employment contract, at least the fourth respondent or its legal predecessor would not have responded in the affirmative. Compare **WILKINS NO v VOGES** 1994 (3) SA 130 (AD) at 136I – to 137C and **BOTHA v COOPERS & LYBRAND** 2002 (5) SA 347 (SCA) at 359 and 360. It follows that in my judgment the applicants failed to prove a *prima facie* right, even though to some doubt.

[11] In the light of this conclusion it is unnecessary to consider the argument of the respondents based on sections 3, 4, 5 and 10 of the Basic Conditions of Employment Act, No. 75 of 1997.

[12] For these reasons the application for an interim interdict cannot succeed. On behalf of the respondents an order allowing costs of two counsel was asked for, but opposed on behalf of the applicants. I do not think that the employment of two counsel was justified by either the scope or the complexity of the matter.

[13] The application is dismissed with costs.

C.H.G. VAN DER MERWE, J

On behalf of Applicants:

Adv. J. P. Daffue

Instructed by:

McIntyre & Van der Post

BLOEMFONTEIN

On behalf of Respondents:

Adv. F. W. A. Danzfuss SC

With him

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