

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

Case No. JA24/02

MAGNUM SECURITY (PTY) LIMITED

Appellant
(First Respondent *a quo*)

and

**THE PROFESSIONAL TRANSPORT
WORKERS UNION**

First Respondent
First Applicant *a quo*

**ELPHAS MLONDOLOZI NKOSI &
108 OTHERS**

Second and Further Respondents
(Second & Further Applicants *a quo*)

JUDGMENT

DAVIS AJA:

INTRODUCTION.

[1] Appellant provides contract guarding services to its customers. To this end, it has employed second and further respondents ('the employee respondents') as security officers. Between April 1996 and March 2000 the terms and conditions of employment of these respondents were regulated by a labour order which provided for the grade of employment applicable to the employees, a maximum of 72 hours for a week, 60 hours of which were ordinary hours of work and 12 hours were regarded as overtime.

[2] On 6 March 2000 Sectoral Determination 3, issued by the Minister of Labour in

terms of the Basic Conditions of Employment Act 75 of 1997, became effective. It provided that, for the twelve month period commencing on that date, employers and security officers were permitted to agree to work a total of 65 hours per week, of which a maximum of 10 could be overtime. The Sectoral Determination further provided that as from 6 March 2001, employers and security officers were permitted to agree that the latter work a total of 60 hours per week, of which 10 would be considered to be overtime.

- [3] In the first year during which the Sectoral Determination applied, it appears from the evidence that most of the employee respondents worked a 60 hour week, 55 hours of which were classified as ordinary hours and five of which were classified as overtime. Most of these respondents appeared to have worked 5 shifts per week of 12 hours each.
- [4] In March 2001 appellant implemented a reduction in the normal working hours for security officers, including second and further respondents. Instead of reducing the working hours to 50 normal working hours (being the maximum normal working hours allowed in terms of the Sectoral Determination) it reduced the normal working hours to 48 on the basis that the reduction of normal working hours to 50 per week would be impractical, viewed within the context of appellant's business.

[5] The respondents brought an urgent application in the Labour Court for an order that appellant restore the terms and conditions of employment that pertained prior to 20 March 2001 as well as compensation for the difference between the amount second and further respondents would have earned between 20 March 2001 and the date of the order had they worked 60 hours per week, alternatively 55 hours per week, alternatively 50 hours per week during that period and the amount, in fact, paid to the second and further respondents during that period.

[6] Appellant challenged the competency of the application on the basis that the dispute was essentially one of interest and not one of right. **Landman J** found that the dispute was indeed a dispute of right, being a dispute which stood to be determined in terms of the Basic Conditions of Employment Act. However, he found that, on the papers, it was not possible to determine whether respondents ‘have separately or otherwise entered into an agreement with Magnum binding them to work 5 hours overtime per week, i.e. compulsory overtime. The employees’ contention that there is such an obligation is specifically denied by Magnum: ‘Applying the usual test for deciding disputes of fact in an application for final relief I must find against the applicants’.

Landman J then referred the dispute to oral evidence in order to determine questions of whether second and further respondents ‘have separately or otherwise entered into an agreement with Magnum prior to 6 March 2001 binding

them to work 5 hours overtime per week, i.e. (a) compulsory overtime); and (b) on whether, after 6 March 2001, those employees had concluded an agreement with Magnum to reduce their working hours to 48 hours per week’.

[7] After hearing evidence from three witnesses who testified on behalf of appellant, **Jammy AJ** found that there was in existence a ‘60 hour’ agreement which was applicable immediately prior to March 2001. He further added that ‘there is nothing in the Sectoral Determination which renders that agreement ineffective when the ratio of ordinary to overtime hours is adjusted to comply with the Determination whilst maintaining the actual working hours for which that agreement provides. The necessity to redefine that ratio is one envisaged by clause 9 of the employment contract. The unilateral reduction in actual working hours effected by the First Respondent, is not’. For these reasons **Jammy AJ** ordered that appellant roster the individual respondents on 5 x 12 hour shifts per week, ‘unless otherwise agreed with individual Applicants and for so long as this is not precluded by law; the actual working week of 60 hours thereby constituted is to be defined as to the respective ordinary and overtime components thereof, so as to comply with the prevailing Sectoral Determination(s) for the private security sector.

[8] The appellant was ordered to compensate the second and further respondents by paying to them the difference between the amount they would have earned

between 20 March 2001 and the date of the order, had they worked 60 hours per week, comprising 50 ordinary and 10 overtime hours, and the amount in fact paid to these respondents during that period.

[9] It is against this judgment and order that the appellant has appealed to this Court.

CONDONATION.

[10] The application for leave to appeal from the judgment of **Jammy AJ** dated 11 April 2002 was unopposed and was granted on 21 June 2002. In accordance with Rule 5(1) of this Court it was then incumbent upon the appellant to deliver its notice of appeal on or before 12 July 2002 which it duly did. In terms of Rule 5(7), it was thereafter incumbent upon appellant to deliver the record on or before 21 September 2002. The record was only filed on 23 April 2003, being seven months out of time.

[11] Mr Beckenstrater, the attorney acting on behalf of appellant, has deposed to a lengthy affidavit explaining the reasons for this lengthy of delay. Briefly stated, it appears that the Labour Court file was mislaid by Sneller Verbatim Transcribers and, notwithstanding numerous attempts by appellant's attorney to locate the file, it was only found on 28 November 2002 in the Pretoria offices of Sneller Verbatim. It would appear then to have taken Sneller Verbatim a little under four

months to prepare the record. Mr Freund, who appeared on behalf of the appellant, sought condonation. This Court decided to hear the merits of the matter before deciding definitively as to whether to condone the late filing of the record. Given the comprehensive explanation provided by Mr Beckenstrater as well as the merits of the appeal, the late filing of the record is condoned.

THE KEY ISSUE.

[12] The central pillar of respondents' case was contained in their statement of case.

The relevant portion of the statement of case reads thus:

'4. No written agreement regulated the actual working conditions which the Individual Applicants were obliged and entitled to work each week. The actual working hours of the Individual Applicants were regulated by express oral, alternatively implied agreement.

5. Prior to the unilateral reduction in working hours in March 2001, the terms of the express, alternatively implied agreement regulating actual working hours were as follows:

5.1 The Individual Applicants were security officers, who for the purposes of the sectoral determination, fell into category B.

5.2 The Individual Applicants were employed at sites where guarding services are provided on a 24 hour basis, in two 12 hour shifts running from 06h00 to 18h00 and from 18h00 to 06h00.

5.3 The Individual Applicants were required to work 60 hours per week. These were the agreed working hours of Individual Applicants, and the First Respondent operated (as far as Individual Applicants were concerned) on the basis of the 60 hour week.....

5.9 When the weekly maximum permissible ordinary hours of work prescribed in the sectoral determination were reduced, the number of ordinary hours required to be worked each week would reduce to the new maximum and the number of overtime hours required to be worked would increase correspondingly, provided that the total ordinary and overtime hours would not exceed the maximum prescribed in the sectoral determination’.

[13] In summary, respondents’ case was that prior to March 2001, an agreement existed between appellant and second and further respondents which provided that these respondents be required and be entitled to work 60 hours per week. Pursuant to the Sectoral Determination, the ratio between ordinary hours worked and overtime required were altered from 55: 5 to 50:10, the latter ratio being the maximum permissible under the sectoral determination with effect from 6 March 2001.

[14] **Jammy AJ** found that an agreement did exist between appellant and second and further respondents. It is this finding that lies at the heart of his judgment and the order which followed consequentially thereon.

THE EVIDENCE.

- [15] The contracts of employment entered into between appellant and second and further respondents contains two clauses which are relevant to the present dispute. Clause 9 provides: “Other conditions of service related to rate of pay, work hours, leave entitlement is governed and regulated by gazette which is published by the relevant minister. These conditions will be covered and explained during induction and will change from time to time in accordance with the government gazette as and when published. Clause 10.5 provides that ‘your employment is further conditional to: placing my services at the disposal of the company in such a manner that the company can achieve its business objectives”.
- [16] Save for these two clauses, there was nothing contained in the contract which dealt specifically with hours of work. Accordingly, the dispute turned on whether respondents had proved a sufficient basis to show that there was an implied term of the contract, to the effect that they had a right (and a corresponding obligation) to be employed for the period 60 hours per week.
- [17] As Mr Ngcukaitobi, who appeared on behalf of respondents correctly submitted, the key question was whether the evidence justified the conclusion that there was an agreement between the parties which gave the employee respondents the right to work a 60 hour week. In support of the contention that the evidence did so support respondents’ case, he referred to correspondence between the parties generated before litigation. In particular he referred to a letter from Mr Vincent

Monyamane, the Human Resources Manager of appellant, who had written to staff on 17 March 2001 as follows:

‘All staff are reminded that the Private Security Industry hours of work are to be reduced from 55 to 50 per week as from 6 March 2001.

The reduction is in accordance with security Industry Basic Conditions of Employment Act No. 75 of 1997’.

To this letter a number of respondents replied on the same day. They said: ‘As Magnum security shop steward and loyal employees of your company we would like to propose a retention of 60 hours per week as per sectoral determination of March 20...’.

[18] On 3 July 2001 Mr Monyamane wrote to first respondent thus: ‘We have previously indicated that even if we were to agree to revert to the 60 hour week that we would be sitting with the problem of how to deal with the employees employed to compensate the reduction to 48 hours’.

[19] Mr Ngcukaitobi also referred to the founding affidavit deposed to on behalf of respondents by Mr Nkosi as well as the opposing affidavit of Mr Monyamane. In his founding affidavit Mr Nkosi stated: ‘From this period, that is from October 2000 my working hours were reduced to 60 hours per week and I worked 5 x 12 hour shifts on week days only. Although this reduction in my working hours had the consequence that my monthly wage was reduced, since I continued to be paid at the minimum wage applicable to me in terms of the sectoral determination, I

accepted the reduction in my working hours. From this period my standard working hours of 60 hours per week, of which 55 were ordinary hours and 5 were overtime hours. These were my agreed working hours from that period onwards. He then went on to state 'Immediately prior to 6 March 2001, the agreed working hours of all of the Individual Applicants was 60 per week, 55 of which were ordinary hours and 5 of which were overtime'.

[20] To the first passage of this affidavit, Mr Monyamane replied 'This allegation is admitted. I submit that the change in the working hours was done in accordance with the provisions of sectoral determination as published in the Government Gazette on the 25th of February 2000. The changes resulted in great cost to the first respondent [the appellant] as it had to employ additional employees and provide uniforms and other equipment to such employees.

[21] To the second allegation Mr Monyamane replied 'this allegation is admitted'. Mr Ngcukaitobi also referred to certain passages of the evidence given by Mr Monyamane, who was asked 'And we also know from the evidence, and that is not in dispute, that the actual working hours were in fact 60 hours, comprising 55 ordinary hours and 5 overtime hours'. To this Mr Monyamane replied 'that is right'.

[22] Under cross examination Mr Monyamane was asked by Mr Todd, on behalf of

respondents, to comment on the following: 'They had agreed to work 60 hours a week, is that right?' Mr Monyamane replied 'They were working 60 hours a week at the time, yes. 'The following proposition was also then put to Mr Monyamane under cross examination: 'Yes well we know that these employees were employees who were all rostered to work 5 x 12 hour shifts', to which Mr Monyamane admitted 'that is right, yes'. Mr Todd then put the following to Mr Monyamane

'And this and what was the consistence and established, and agreed practices between the company and this group of workers', to which Mr Monyamane conceded 'that is right, yes'.

- [23] On the basis of this evidence Mr Ngcukaitobi submitted that appellant had made significant concessions in correspondence, in the opposing affidavit of Mr Monyamane as well as in the testimony given by Mr Monyamane before the Court *a quo*. Mr Ngcukaitobi contended there was a sufficient basis to justify the conclusion that the parties had intended to conclude a contractual arrangement by which second and further respondents would work 60 hours a week. He further submitted that the fact that the Sectoral Determination had altered the ratio between ordinary hours to overtime hours from 55:5 to 50:10 did not change the right which employees enjoyed to work 60 hours per week (and crucially therefore to be paid for that period of work) together with the corresponding obligation on the employer to ensure that they were employed for that period.

[24] Mr Freund, contended that respondents were not entitled to rely upon any of these elements of the record. Thus, continued Mr Freund, none of the contents of the correspondence to which Mr Ngcukaitobi had referred had ever been put to any of appellant's witnesses during the course of the trial and therefore appellant had not been afforded an opportunity during the trial to clarify any possible ambiguities inherent therein.

[25] Referring to the answering affidavit of Mr Monyamane, Mr Freund submitted that, like many of the statements which appeared in the record, the passages in the affidavit relied upon by respondents needed to be read within the context of the whole record. There was no factual dispute that individual respondents had worked 55 ordinary hours and 5 hours overtime per week immediately prior to 6 March 2002. It was also apparent that the individual respondents had complied with the instruction (or at least the request) of appellant without objection. Viewed within this context, it was legitimate to classify the actual hours worked as 'agreed working hours'. It did not follow, however, that it was common cause that, prior to 6 March 2001, appellant was obliged to permit respondents to work 60 hours per week and to pay them accordingly.

[26] Mr Freund contended that similar ambiguities were inherent in the evidence of Mr Monyamane upon which reliance has been placed by respondents. Although

Mr Monyamane had conceded that ‘agreed working hours’ amounted to 60 hours per week, he had also insisted that appellant had a discretion insofar as the number of working hours were concerned. When asked by Mr Todd: ‘Now I assume you are not suggesting that in one week the company in its discretion could remove 5 hours from the 60 the overtime components from the 60’?, he replied ‘Well our contract of employment like we, we mentioned just now, specifies that the security officers, the employees place their services at the disposal of the company in such a way that the company can achieve its business objective.’ Mr Todd then asked ‘Yes well you are not suggesting, are you that there could be any possibility that the company could achieve its business objectives by removing 5 hours off the fifth shift of each of these workers in that period’? Mr Monyamane replied ‘Depending on operational requirements, if a client requires either additional hours or less hours than they were working, if they were working 60 hours at the time, required 11 hours and we required certain security officers to work at that client’s site, yes then we would place them at that site and the hours would consequently be reduced’.

- [27] Mr Freund also referred to the evidence of Mr Monyamane where he was asked the following: ‘So you would accept then that the workers would have been entitled to expect that you could not change their work hours unless the sectoral determination required it’? He replied: ‘I think we could even if the sectoral determination did not require it. You see we, we could change it to meet with our

operational requirements and client demands’.

THE ALLEGED TERM.

[28] The essence of this dispute turns on the alleged existence of a term of an agreement. In this regard I think that clause 9 of the contracts of employment applicable to the second and further respondents is significant. It has been quoted in par 15 above and it is unnecessary to quote it again. Its effect seems to be that, as to the hours of work agreed to between the appellant and each one of the second and further respondents is that hours of work would be those provided for in the sectoral determinations from time to time. In the present case, the evidence read holistically forms the basis of the enquiry into the existence of the alleged term. In this connection the evidence of Messrs Botes, Bezuidenhout and Monyamane becomes critical.

[29] Mr Botes testified that the working hours in the security industry prior to March 2000 was 60 hours ordinary working hours and 12 hours overtime. He said that in practice category B security officers at the time normally worked 12 hours per day over a five day week. He also said that the working of overtime was seldom in the industry at that time unless it was inevitable.

[30] The attorney for the respondents put it to Mr Botes that in a case such as that of the individual respondents, where the agreement between the employer and the security officers is to work a 12 hours x 5 days a week which is 60 hours per week

of which 55 is ordinary hours and five overtime, the employee would not be entitled to refuse to work the last five hours on the basis that working overtime is voluntary would not work and Mr Botes agreed that that would not work. It was then put to him that similarly the employees in such a case would be entitled to insist to the employer that he work that overtime. Mr Botes then answered: **“If there was an agreement to work overtime, that five hours overtime per week, then an agreement is an agreement.”**

[31] Mr Bezuidenhout testified that there was no fixed overtime of five hours. He testified that there were no fixed hours of work and that these were determined by the requirements of the client’s contract. He said that in effect the client determined the hours of work. It was put to Mr Bezuidenhout under cross-examination that the contents of the appellant’s newsletters called “Magnum Indaba” dealing with the reduction of hours – portion of which has been quoted above – seemed to suggest that the appellant was aware that what it was proposing to do was **“to take a whole group of workers whose working hours were 60 hours a week and reduce them to 48 hours a week.”** He was then asked: **“Is that correct”?** And he answered: **“Ja, dit lyk so (Yes, it seems so.)”**

[32] The attorney representing the respondents drew Mr Bezuidenhout’s attention to the second paragraph of Mr Monyamane’s memorandum of February 2001 to the workers and, by implication suggested that the contents thereof were

an acknowledgement by the appellant that between March 2000 and 6 March 2001 the individual respondents' hours of work per week were 55 ordinary hours and five overtime to make 60. The second paragraph in that memorandum reads thus:-

“During the year 2000, which was the first year of implementation, the hours of work were reduced to 55 hours per week for all security officers. This meant that security officers worked 55 hours and were paid overtime for the additional five hours worked.”

After this paragraph had been read to Mr Bezuidenhout, he was asked whether he saw that and he answered in the affirmative.

- [33] Later it was put to Mr Bezuidenhout under cross-examination: **“What I want to suggest to you is that it was clear to everybody’s mind that prior to March 2001 the agreed work hours of the group of workers that we are talking about was 60 per week.”** Mr Bezuidenhout answered: **“Ja, it is 55 plus 5 working, ja.”** It was then said to him: **“And those were the agreed working hours of this group of workers.”** He answered: **“That is what they were rostered for, yes.”**

- [34] The attorney representing the respondents then read a portion of a letter from the appellant to the union that was written after the litigation in this matter had begun.

The portion of the letter read thus:

“We have previously indicated that even if we were to agree to revert to 60 hour week that we will be sitting with the problem of hour to deal with the employees employed to compensate for the reduction, to 48 hours.”

Mr Bezuidenhout was then asked whether he saw that and he said yes. The attorney said to him:

“Once again the point I am simply making is that as far as the company was concerned it was very clear that prior to March the agreed working hours was 60 and yes, that was broken down as 55 and five, but the number of hours that people worked was 60. You accept that proposition. I am sure.”
(Underlining supplied.)

He was then asked whether the answer was **“Yes”** and he said: **“Yes”**.

[35] Counsel for the appellant, while leading Mr Monyamane in chief, made this statement: **“And we also know from the evidence, and that is not in dispute, that the actual working hours were in fact 60 hours, comprising 55 ordinary hours and five overtime.”** Mr Monyamane responded to this statement by saying: **“That is right.”** Mr Monyamane was then asked how the appellant had arrived at the 55 plus 5 configuration **“applying these two conditions.”** Mr Monyamane replied: **“Again, from operational requirements, we wanted**

these guys to work 12 hours, so we fixed them at 60 hour comprising 55 plus five because operationally that is how the guys work; they work 12 hours a day.”

Mr Monyamane also said that whenever clients required overtime or specific hours, the workers worked those hours.

- [36] Counsel for the appellant then put the following to Mr Monyamane during his evidence in chief: **“I want to take the reverse of how I understand the applicants’ case. As I understand their case is that there was an agreed 60 hours for the period March 2000 to March 2001 consisting of the 55 plus configuration which we have admitted.”** Mr Monyamane responded: **“That is right, yes.”** Under cross- examination the attorney for the appellant put the following to Mr Monyamane: **“Well there was an agreement between you and the company and those workers that they would work 60 hours.”** Mr Monyamane replied: **“I would say an implied agreement.”** A little later the following exchange between the attorney for the respondent and Mr Monyamane occurred:

“Mr Todd: The applicable workers here were obliged to turn up for work, report for their shift five times for 5x 12 hour shifts each week, isn’t so?”

Mr Monyamane: If they were rostered, yes, they were obliged
to, to turn up.

Mr Todd: Yes well we know that these employees were employees
who were all rostered to work 5x12hour shifts.

Mr Monyamane: That is right, yes.

Mr Todd: And that was a consistent and established, agreed practice as
between the company and this group of workers.

Mr Monyamane: That is right, yes.”

[37] With regard to the overtime component of the 60 hours of work per week, it was suggested that this was not a situation where the appellant could remove the five hours in a particular week. Although Mr Monyamane initially suggested that the appellant could do so, he later made it clear that that overtime was not voluntary. The exchange between him and the respondent’s attorney in this regard ran thus:

Mr Todd: We are talking about a situation where these workers are
obliged to report to clients that require guarding hours
a day in 5x 12 hour shifts, isn’t that so?

Mr Monyamane: Yes, that is right, yes.

Mr Todd: Well, will you not agree with me that the question of the five

hours overtime was not a voluntary question. It was not a question whether in any one week you could decide that a worker was going to leave a shift five hours before the end of it.

Mr Monyamane: Right, yes I agree with that.

Mr Todd: You agree with me?

Mr Monyamane: Yes.”

[38] Because there had been a suggestion that the appellant had a discretion to change the respondents’ hours of work, the respondents’ attorney cross- examined Mr Monyamane on the scope of such a discretion. In this regard he drew Mr Monyamane’s attention to the fact that the second and further respondents were not security officers who were rendering services at banks or shopping centres and who, therefore, worked hours when those businesses were open. He said to Mr Monyamane:

“In this instance we are not talking about those kinds of

guards, we are talking about guards who were working on

industrial contracts where their working hours were 5x

12 hour shifts

a week. Isn’t that correct?” Mr Monyamane then

answered, **“Yes.”**

[39] However, Mr Monyamane later said that the appellant could reduce those hours if

its operational requirements required that to be done. He said that it could do so without reference to the employees concerned and relied on clause 10.5 of the written contract between itself and each of the second and further respondents to entitle it to change the hours without reference to the employees. He even said consultation with the employees would not be required. Mr Monyamane said that in that clause each worker had agreed to place his services at the appellant's disposal in such a manner that the appellant could achieve its objectives. He also said that, when the sectoral determination changed, the appellant's business requirements also changed and thus entitled the appellants to effect changes to the employees hours of work if the operational requirements required that. The defence raised by Mr Monyamane in regard to clause 19.5 of the contracts of employment would be whether that clause entitled the appellant to change the hours of work without the consent of the employees or put differently whether it takes away the employees' right not to have their terms and conditions of employment changed by the appellant without their consent. There is no doubt that it does not and, really, nothing more needs to be said about that.

[40] The respondents' attorney once again said to Mr Monyamane:

“I take that we are in agreement on the fact that all of the workers in this application, but for what I may refer to as any exceptional cases that may have been identified and we will deal with those separately, but that in so far as the bulk of workers who were working 60 hour

week is concerned, do you accept that those were that agreed working hours of those workers?”

Mr Monyamane answered: **“That is right.”**

The Court then asked Mr Monyamane whether he had answered affirmatively and he said: **Correct M’Lord.”**

[41] Later the respondent’s attorney said to Mr Monyamane: **“But at that point you were working over time anyway, you were working five hours overtime as a matter of course by agreement with these workers.** “Mr Monyamane responded: **“That is right, yes.”**

[42] Mr Monyamane conceded that there was nothing in the sectoral determination which required the appellant to reduce the hours of work to 48 per week.

Evaluation

[43] When these critical pieces of evidence are read there can simply be no doubt that the appellant and the second and further respondents had agreed that the latter work 60 hours per week which were made up of 55 ordinary hours and five hours overtime. It is common cause that they worked five days per week from 06h00 to 18h00 each day which means 12 hours per day. The agreement between the

parties was for five hours overtime per week. This was at a time when the applicable sectoral determination fixed the maximum overtime per week at 10 hours. It is also clear from the above that the overtime component of the 60 hours was also not voluntary overtime and that neither the security officer could simply refuse to work that five hours in any week for no reason other than that he did not like it nor could the appellant itself simply take that overtime component away. It was said in evidence that the hours of work were dictated by the client. Assuming that this evidence was true – and I am not deciding that it necessarily is – the position must be that the second and further respondents' hours of work were 60 per week including an overtime component of five hours because it was common cause that the second and further respondents worked in industrial plants where the clients required their premises to be guarded 24 hours a day.

[44] There was an attempt by the appellant to put up a version to the effect that there was no agreement between the appellant and the second and further respondents fixing any hours of work including overtime but that the agreement between the parties was that the second and further respondents worked only during those hours when the appellant required their services and were only paid for hours actually worked. It was said that this meant that, if the appellant did not require a particular security officer on a particular day or during a particular week or even a month, the security officer would simply stay at home and would not be paid. To justify this it was said that in the security industry security companies lose contracts frequently and that that is why the appellant employed its security officers on that basis.

[45] I reject this version. Both Mr Botes and Mr Monyamane testified that the actual hours of work for the second and further respondents were the hours of work that the Sectoral Determination provided for as maximum hours of work. They furthermore testified repeatedly that these hours were agreed between the

appellant and the second and further respondents. On behalf of the appellants it was suggested that there may have been occasions when some employees may have worked for less than 60 hours and were paid only for the hours they had actually worked and not for 60 hours and they had not complained. It was contended on this basis that the appellant and such employees had no agreement for a 60 hour week otherwise such employees would have complained. There are two answers to this contention. The one is that the appellant's own witnesses gave clear and unequivocal evidence that the second and further respondents worked agreed hours totaling 60 per week. The second is that, based on this evidence – which comes from the appellant's own witnesses – such employees as may have worked less than 60 hours in a particular week would have been entitled to claim wages for the balance of the hours if they had tendered their services for the 60 hours and the fact that the appellant may have got away with a violation of such employees' contractual rights does not turn its unlawful conduct to lawful conduct.

- [46] Appellant admitted that it reduced the hours of work of the second and further respondents from 60 to 48. Of course, it was entitled to reduce the ordinary hours of work from 55 to 50 because the Sectoral Determination so required. Accordingly, to the extent that appellant reduced the second and further respondents' ordinary hours by five hours (from 55 to 50), it was not only entitled to do so but was obliged by the Sectoral Determination to do so. I accept this. But appellant took off two further hours of work from the second and further respondents' ordinary hours of work when it reduced them to 48 per week. In this regard, it is common cause that second and further respondents did not

agree to this reduction. There may have been consultation between the appellant and the representatives of the respondents about the further reduction to 48 hours.

But that is beside the point. What in law is required for an employer to effect a change to the terms and conditions of employment of an employee is the latter's agreement to the change. The operational requirements of the appellant can provide no valid justification in law for appellant to effect a reduction of second and further respondents' hours of work without their agreement. The appellant's conduct in changing the terms and conditions of employment of second and further respondents without their consent constituted a repudiation of their contracts of employment and was unlawful. Appellant's remedy, if it wanted to reduce the second and further respondent's hours of work, – in order to suit its operations, – lay in negotiating a change to the actual hours of work of the second and further respondents and to obtaining their agreement for a change to be effected. If no agreement was reached, appellant would have a right to dismiss second and further respondents for operational requirements and employ employees who would be prepared to accept employment on terms and conditions that would satisfy the operational requirements of the appellant.

- [47] On the basis of this evidence, the further reduction from 50 hours to 48 hours was unlawful. That repudiation by the appellant gave second and further respondents an election. If they rejected it, they were entitled to hold appellant to their contracts of employment which included 50 ordinary hours of work per week after the Sectoral Determination came into operation. In this matter respondents, as they were entitled, rejected the repudiation and brought an application to hold the appellant to the contracts of employment as read with the Sectoral Determination.

- [48] There was a suggestion made on behalf of respondents that, despite the provision of the Sectoral Determination reducing their ordinary hours from 55 to 50, they were still entitled to keep their 60 hour week and that the appellant was obliged to continue with the 60 hour week but this time with 50 (instead of 55) ordinary hours and 10 (instead of 5) overtime hours per week.
- [49] It appears that the basis for this argument was that, when the sectoral determination came into operation, the second and further respondents each had an agreement with the appellant to work 60 hours per week and that all that the Sectoral Determination did was to in effect reduce the number of ordinary hours and in effect increase the overtime hours. The suggestion seems to have been that, the five hours from the 51st hour to the 55th hour which previously were ordinary hours simply became part of overtime hours and that, instead of five hours overtime, the respondents now had 10 hours overtime.
- [50] It is possible to construe the effect of the Sectoral Determination as being to reduce the ordinary hours of work from 55 to 50 but leave intact the agreement between the parties regarding an overtime of five hours per week. That construction would mean that the only thing that the Sectoral Determination changed was that the ordinary hours had been reduced from 55 to 50 per week, – which meant that the workers would not get paid for 5 ordinary hours which would reduce their pay. They would thus not work the additional five hours which period of work was a benefit to them. In terms of this construction, the parties were left to negotiate about these five hours as whether they be included as overtime, whether the employer would make other arrangements or negotiate with the entire group of employees to see whether they would agree to additional or new terms and conditions of employment or new hours of work.
- [51] Both constructions have some merit. On balance, I am of the view that the former construction is to be preferred. The agreement between the parties is that second and further respondents must tender their services for the period 06h00 to 18h00 for five days per week of which the period from 13h00 to 18h00 on the fifth day was overtime. The Sectoral Determination which reduced the ordinary hours of work did not have the effect of removing the employees' obligation to tender their

services for five days a week from 06h00 to 18h00. That contractual obligation remained. The effect of the Sectoral Determination was to alter the five hours from 08h00 to 13h00 on the last of the five days per week from being ordinary hours – if they were worked – to overtime.

[52] Turning to the order of the Court *a quo*, the provision that the appellant be compelled to roster second and further respondents for 5 shifts of 12 hours per week is, in my view, an inappropriate order, viewed within the context of appellant's business operations. An appropriate order would be to declare second and further respondents hours of work and order appellant to pay them such amount of their wages as were not so paid but would have been paid had they been allowed to work a 60 hour week of which 50 hours would have been ordinary time and 10 hours overtime. It will accordingly be necessary to alter Jammy AJ's order despite the fact that the appeal falls to be dismissed.

[53] As neither party insisted that there should be an adverse award of costs against the unsuccessful litigant, given the ongoing relationship between the parties, it would not be appropriate to make an award of costs.

[54] For these reasons the appeal is dismissed, but the order of **Jammy AJ** is set aside and replaced with the following order:

1. The working week of the second and further applicants is declared to be 60 hours comprising 50 ordinary and 10 overtime

hours.

2.. First respondent is ordered to compensate second and further applicants by paying them the difference between the amount they would have earned between 20 March 2001 and 11 April 2002 had they worked 60 hours per week, comprising 50 ordinary and 10 overtime hours, and the amount in fact paid to the individual applicants during that period.

3. Should disputes or a dispute between the parties arise as to the amount that the appellant should pay to any one or more of the employee applicants pursuant to the order in 2 above, leave is hereby granted to anyone of the parties to approach the Labour Court for the purposes of the determination of such dispute.

4. There is no order as to costs.

DAVIS AJA

I agree

ZONDO JP

I agree

JAFTA AJA

APPEARANCE

For the appellant : Advocate A. Freund
Instructed by : Moodie & Robertson

For the respondents : Mr T. Ngcukaitobi
Instructed by : Bowman Gilfillan

Date of judgment : 27 May 2004