



REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J409/10

In the matter between:

DIE CALVINIA LANDE BK

Applicant

and

THE DEPARTMENT OF LABOUR

First Respondent

ABRAHAM HENDRIK PETRUS HANEKOM

Second Respondent

Heard: 28 June 2012

Decided: 04 July 2012

Summary: Appeal to Labour Court in terms of section 72 of the Basic Conditions of Employments Act, 1997. Evidential material that was before Director General and that before court materially different. Circumstances of matter and statutory construction of section 72 lead to consideration of matter put before court. On that matter, which was not countered, appeal to be upheld

JUDGMENT

BEATON, AJ

- [1] This is an appeal brought by the Applicant, a close corporation which conducts a butchery in the Calvinia area in the Northern Cape. The appeal is brought in terms of section 72 of the Basic Conditions of Employment Act, 1997 (“BCEA”) against a decision of the Director-General of First Respondent to confirm a compliance order issued by a labour inspector on 9 September 2009 directing Appellant to pay one of its employees, Second Respondent, an amount of R94 910,31 in respect of overtime worked during the period April 2007 – January 2008.
- [2] The appeal was brought outside the 21 day period contemplated in section 72(1) of the BCEA and exceeded that time limit by about 24 days. The explanation for the delay is the time it took for proper communication between the Appellant, its labour consultant, the attorney of record and the counsel briefed by that attorney. Given that the attorneys is in Pretoria and the Appellant in Calvinia the explanation has the ring of truth to it and was not questioned by the First Respondent which confined its opposition to the condonation application to an argument on the prospects of success. In my view, that approach was the correct one and the lot of the condonation application should be determined by whether there is a prospect of success in the appeal. This necessarily involves an assessment of the merits of the appeal itself.
- [3] In my view the determination of the appeal turns on the question whether the appeal contemplated in section 72 of the BCEA is a wide or a narrow one as set out in the judgment of Ngcobo AJP in *Staff Association for the Motor and Related Industries v Motor Industry Staff Association and Another*.¹ A wide appeal is one in which there is a complete rehearing, with or without additional information or evidence, whilst a narrow appeal is one limited to the information which was before the body from which the

¹ (1999) 20 ILJ 2552 (LAC) at para 18.

appeal comes and the sole question for determination is whether that body's decision was right or wrong.

- [4] This question arises because the representations submitted by the Appellant to the Director-General, to which were annexed the submissions it had made to the labour inspector prior to the latter's issuing a compliance order, dealt in broad terms with the nature of the relationship between Appellant and Second Respondent and contained broadly stated denials of Appellant's liability to pay overtime to Second Respondent. The allegations which ultimately formed the basis of the compliance order were set out in a letter from the First Respondent to Appellant dated 2 July 2009 and contained the number of hours overtime claimed and the rate at which such should have been paid. In my view, despite a submission to the contrary by Ms Prinsloo, who appeared for Appellant, the Inspector and Director-General were entitled to make the orders they did on the material before them, subject to one proviso. Those orders were for overtime calculated on a monthly basis over a period of 12 months. On the material submitted by Second Respondent to the Inspector he had only been employed for 10 months. The amount for which the compliance order should have been issued should thus be reduced accordingly by 1/6th, even if the appeal is approached as a narrow one.

- [5] The submissions filed by the Appellant in this Court give the matter an entirely different complexion.

Those submissions, whilst concise as is required by Rule 9(6) of the Rules of this Court, contain as annexures time sheets and hand-written extracts from log books (Second Respondent was a driver) together with summaries of relevant entries which show quite clearly that Second Respondent was paid more than he was due in respect of overtime. Mr Mashaba, who appeared for the Respondents, did not submit that the factual submissions of Appellant to the Court were inaccurate.

- [6] The only reported authority dealing directly with the question of whether an

appeal in terms of section 72 of the BCEA is a wide or a narrow one is *Comtech Networking Solutions CC v Director General of Department of Labour and Another*.² The question was not decided and the Court, per Pillay J stated that:

‘The circumstances of each case determine whether the appeal is most effectively resolved if it is determined on the record or reheard by the Court or the Department of Labour’.

The Court went on to find that because the appeal was against an administrative decision, it was permissible to refer the matter back to the Director-General.

[7] Whilst I do not necessarily agree with the above line of reasoning as the question of a wide/narrow appeal depends upon a proper construction of the applicable statutory provisions, it is unnecessary to decide the question since the application of the test propounded in the *Comtech* judgment and a proper construction of the applicable statutory provisions lead to same conclusion, being that the appeal in this matter should be approached as a wide one. On the approach set out in the *Comtech* judgment, the relevant circumstances in this matter are that:

- a) The Inspector’s compliance order was issued on 2 July 2009 and the current appeal heard almost 3 years later;
- b) Justice would require, at the very least, that the Director-General consider the comprehensive representations made by Appellant in this Court;
- c) There has been no indication that the factual allegations contained in the said representations are inaccurate; and
- d) The remittal of matter to the Director-General will only further delay the matter;

² (2010) 31 ILJ 600 (LC) at para 5.

I am of the view that the above circumstances require that the appeal be approached as a wide one. As indicated above, if regard is had to the representations submitted to this Court there was no underpayment of overtime.

- [8] I turn now to consider the proper construction of the applicable provisions in the BCEA.

8.1 The *Staff Association* matter (*supra*) dealt with the nature of an appeal as contemplated in section 111 of the Labour Relations Act, 1995 ("LRA") against a decision of the Registrar of Labour Relations concerning the registration, or de-registration of an employers' organisation or a trade union. That judgment thus interpreted a different provision in a different statute so that no reliance, other than in relation to general principles articulated therein, can be placed on it in construing the provisions of section 72 of the BCEA.

8.2 In *Ephraim v Bull Brand Foods (Pty) Ltd*,³ Van Niekerk J remarked as follows:

'The BCEA clearly contemplates that this court has a general supervisory function in the statutory scheme of enforcement (given its appellate functions in terms of section 72), that it should facilitate the enforcement of orders made by the appropriate functionaries (given its powers to make compliance orders of court) and that it should ultimately act to impose punishment for continued breaches of the Act (given the court's powers to impose fines in terms of schedule 2 to the Act), the Act does not extend to this court those functions that are reserved for the labour inspectorate, and in particular, it does not contemplate that this court may grant orders that would effectively amount to the compliance orders contemplated by

³ (2010) 31 ILJ 951 (LC) at para 6.

section 69.’

8.3 The “appellate functions” alluded to are clearly something in addition to a review, for such a remedy is available in any event. Whilst there is a difference between a narrow appeal (which deals with the merits of the decision) and a review (which deals with the way in which the decision is reached), that difference has been further narrowed by the requirement of rationality contemplated in section 6(2)(f)(ii) of the Promotion of Administrative Justice Act, 2000 and as envisaged in the judgment in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.⁴ Although that judgment dealt with the rationality requirement in respect of arbitration awards made by Commissioners and arbitrators under the LRA, the principle applies also to decisions made by the Director-General in terms of section 71 of the BCEA. In my view giving the word “appeal” where it is used in section 72 of the BCEA the meaning of a narrow appeal as defined in the *Staff Association* matter will give this Court so narrow a role in supervising the statutory scheme of enforcement in the BCEA, that the provisions of section 72 would be rendered virtually meaningless. This could not have been the intention of the legislature. I thus conclude that the appeal contemplated in section 72 of the BCEA is a wide appeal.

[9] First Respondent and the Inspectors who made the compliance orders were carrying out their statutory tasks *bona fide*. Accordingly, there is no

⁴ (2007) 28 ILJ 2405 (CC).

basis upon which to make a costs order against them.

I thus make the following order:

- a) Condonation is granted for the late filing of the appeal in this Court.
- b) The appeal is upheld and the compliance order of 2 July 2009 issued by the Regional Manager against Appellant for the payment of R94 910,31, as well as the decision of the Director-General of Labour of 9 September 2009 to uphold the compliance order, are set aside.
- c) There is no order as to costs.

RG BEATON AJ

Acting Judge of the Labour Court

APPEARANCES:

For The Applicant: Adv: Prinsloo (instructed by Vogel Malan Attorneys)

For The Respondent: Adv: M.G. Mashaba (instructed by the State Attorney)