



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 215/12

In the matter between:

SOUTH AFRICAN POLICE SERVICES

Applicant

and

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

First Respondent

ADV SIRKHOT N.O

Second Respondent

POLICE AND PRISON CIVIL RIGHTS UNION

Third Respondent

SOUTH AFRICAN POLICE UNION

Fourth Respondent

Heard: 10 February 2014

Delivered: 28 March 2014

Summary: Application in terms of section 145 of the LRA to review and set aside an arbitration award. The court finding that the conclusion reached by the commissioner was unreasonable in that the commissioner's interpretation of clause 5 of SSSBC Agreement 1 of 2010 not only ignored the plain grammatical meaning of that clause but also failed to take into account the context and purpose of that collective agreement which was to dispense with the administrative burden of capturing hours worked in respect of overtime. That, on proper interpretation, both the plain and grammatical

meaning of the clause 5 of agreement 1 of 2010 as well the context and purpose of that agreement pointed to the fact that officers who work overtime during special events must be paid the converted non-pensionable special daily overtime allowance regardless of whether or not such special event falls on a public holiday. That therefore the interpretation adopted by the commissioner was so unreasonable that no reasonable decision maker could have reached it. In the result, the award is reviewed and set aside.

JUDGMENT

ZONDO AJ

Introduction

- [1] This is an application to review and set aside an arbitration award handed down by the second respondent (“the commissioner”) on 13 November 2011 under case number: PSSS 87-11/12.

Factual background

- [2] Sometime in December 2007, the applicant (“SAPS”) concluded a collective agreement referred to as agreement 4 of 2007 with the third and fourth respondents, (“the 2007 agreement”), with the sole purpose of regulating overtime in terms of a single agreement. Clause 3 of the 2007 agreement made reference to three types of overtime, namely, normal overtime; overtime for duties performed on Sundays as well as overtime for duties performed on a public holiday.
- [3] In terms of the normal overtime, as defined in clause 3.2.5 of the 2007 agreement, all overtime duties performed from Monday to Saturday, regardless of whether such duties are performed during the day or night, members of the SAPS performing such duties are to be paid at a rate of one and a half times the member’s wage for overtime worked. As for overtime performed on a Sunday and public holiday, members of SAPS performing such duties are to be paid at a rate of double the employee’s wage for overtime worked.

- [4] Under the 2007 agreement, payment of all types of overtime, as outlined above, is calculated on the basis of the actual number of hours of overtime performed and for that reason and for administrative purposes, employees performing overtime duties are required to record the actual number of hours worked. The number of overtime hours worked by an employee must further be verified by that employee's commander and a claim for overtime to be accompanied by a time sheet.
- [5] This administrative process of recording, verifying and capturing of overtime soon proved to be quite cumbersome for the SAPS, especially during major sporting events, conferences, summits and other events of national importance ("special events") where a large contingent of employees were required to perform overtime duties. As a solution to this administrative headache, on 14 April 2009, SAPS and the respondents concluded agreement 4 of 2009 which introduced a special daily allowance for policing duties at special events.
- [6] On 17 May 2010, SAPS and the respondents concluded a further agreement, agreement 1 of 2010 ("the 2010 agreement") which replaced agreement 4 of 2009, entitled: "Agreement on a special daily overtime allowance for policing duties at special events". The 2010 agreement made provision for the payment of R 700-00 per day for duties performed at a special event. In terms of the 2010 agreement, employees performing duties at special events were no longer required to record the number of hours of overtime worked and, conversely, regardless of the number of hours worked, employees would be entitled to the daily overtime allowance of R700-00. For all intents and purposes, the 2010 agreement mirrored its 2009 predecessor which had the same provisions save for the difference in the daily overtime allowance.
- [7] Clause 5 of the 2010 agreement ("clause 5") provides thus:
- 'This agreement neither repeals nor replaces SSSBC Agreement 4 of 2007. However, in instances where the converted non-pensionable special daily overtime allowance is payable, the normal overtime prescripts relating to the payment of overtime are not applicable'. (My emphasis).

- [8] This is the clause at the very heart of the dispute and I return to it later in this judgment. Ahead of the Municipal elections in May 2011, the President of the Republic of South Africa proclaimed the 18th of May 2011 a public holiday, being the day on which the Municipal elections were going to be held. Following this proclamation, SAPS then declared 17, 18 and 19 May 2011 as special events days, which are the day preceding the elections, the day of the elections and the day after the elections.
- [9] Apart from the 18th which also happened to be a public holiday, all parties understood the 17th and the 19th to be the special events days and for which employees would be paid a special daily overtime allowance in keeping with the 2010 agreement. The dispute then centred around the 18th of May, whether, seeing that it was a public holiday, which happened to be classified as a special event, employees were entitled to be paid according to the overtime provisions as set out in the 2007 agreement in so far as they relate to public holidays or in accordance with the 2010 agreement in so far as the 18th was classified as a special event, regardless whether same happened to be a public holiday.
- [10] The applicant contended that, because the 18th was classified as a special event, employees who performed duties on that day were entitled to a special daily overtime allowance in line with the 2010 agreement regardless of whether the 18th was a public holiday. The respondents on the other hand contended that their members were entitled to be paid double their wages for overtime worked on the 18th as this was a public holiday the compensation for which was regulated by the 2007 agreement. For this contention, the respondents relied on the interpretation of clause 5, and more specifically, the phrase "*normal overtime*". They further contended that the 2007 agreement specified three types of overtime, that is, normal overtime, overtime for duties performed on a public holiday and lastly, overtime for duties performed on a Sunday.
- [11] According to the respondents, the use of the phrase "*normal overtime*" in the 2010 agreement is in reference to the type of overtime as contained in the 2007 agreement and, as opposed to an overtime for duties performed on a Sunday and public holiday.

They then contended that, read in that way, clause 5 only excludes normal overtime where converted non pensionable special daily overtime allowance is payable. That because clause 5 only excludes normal overtime and not the other two types of overtime as set out in the 2007 agreement and since the 18th was a public holiday, employees are entitled to be paid double their wages for overtime worked in line with the 2007 agreement.

- [12] The applicant on the other hand, contended that the phrase “*normal overtime*”, as contained in clause 5, cannot be interpreted to mean the type of overtime as stipulated in the 2007 agreement but rather that the word “*normal*” should be given its plain grammatical meaning as a synonym of the word “usual or customary” as defined in the Oxford English Dictionary. Further, the applicant contended that, quite apart from the plain grammatical meaning of clause 5, the context and purpose of the entire collective agreement dictated that it could never have been the intention of the parties to retain the other types of overtime as contemplated in the 2007 agreement as this would defeat the very purpose of concluding the 2010 agreement which was, to alleviate the administrative burden of having to record, verify and capture the number of overtime hours worked by an employee. Unable to resolve their dispute as they adopted different interpretations, the parties then referred the matter to the first respondent for interpretation of clause 5.

The award

- [13] In his award, the commissioner made the following findings:
- 13.1 The interpretation preferred by SAPS to clause 5 would result in injustice, unfairness to the respondents and amount to absurdity;
 - 13.2 SAPS by their conduct were seeking to change the character of the Public Holiday by calling it a special event;
 - 13.3 It is the date itself that is relevant and on that basis it is declared a Public Holiday and not its possible classification as a special event by SAPS;

- 13.4 The most reasonable interpretation is that the parties have agreed that employees who work on public holidays that are declared special events will not be entitled to the special daily overtime allowance of R 700,00 but the agreed overtime rate for duties performed on a public holiday at double the employee's wages in terms of clause 3.4.1 of SSSBC Agreement 4 of 2007;
- 13.5 The compensation payable to employees who work on special events as opposed to Public Holidays are markedly different and it is therefore highly unlikely and improbable that the respondents would have been signatories to SSSBC Agreement 1 of 2010 on the understanding that they would be prepared to accept a lesser remuneration where public holidays have been declared special events as opposed to the higher remuneration already agreed upon in terms of clause 3.4.1 of SSSBC Agreement 4 of 2007.

The review

- [14] The test for review of awards is by now well established and hardly requires restating.¹ Notwithstanding the well-established review test, there has been some confusion in so far as the proper interpretation of the *Sidumo* decision resulting in the so called process related review. Fortunately, sanity has finally prevailed and that confusion has now been put to bed by the Supreme Court of Appeal in the *Herholdt* decision and accordingly, there is now certainty as to how far this Court can go when faced with an application to review and set aside an award.²
- [15] In this case, therefore, like in all reviews concerning the awards, the starting point ought to be whether the award is a decision which a reasonable decision-maker could have reached. Concomitant to this enquiry is whether, there exists a defect in the

¹ See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC)

² See *Herholdt v Nedbank Ltd* (2013) 34 ILJ 2795 (SCA) where the court held: "A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145 (2) (a) (ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."

award and if so, whether such defect amounts into a gross irregularity in that either the commissioner misconceived the nature of the enquiry or he arrived at an unreasonable result and thus rendering his award reviewable.

- [16] At the heart of the review is the interpretation that the commissioner gave to clause 5, whether same is a reasonable one taking into account the plain grammatical meaning of clause 5 as well as the context and purpose with which the 2010 agreement was concluded. It was submitted by counsel for the applicant that, in the wake of the *Herholdt* decision, the commissioner appears to have misconceived the nature of the enquiry in making his award. I am not persuaded that this is indeed the case, as a matter of fact, I think the commissioner had a clear understanding of what was required of him when regard is had to his reasoning which of course, informed his conclusion.
- [17] The fact that he adopted a different interpretation to that favoured by the applicant is no reason to suggest that he may have misconceived the nature of the enquiry. It is apparent from the award that the commissioner adopted a literal interpretation to clause 5 as he sought to discern the intention of the parties from the words and phrases used in that clause.³
- [18] The approach to the interpretation of contracts was best summarized in the *Coopers* decision and same should guide us in interpreting clause 5.⁴ In our law, the object of the Court in interpreting a contract is to seek the common intention of the parties and

³ Award: "As is the case in all exercises of interpretation, the starting point is to try and determine the intentions of the parties from the words used. The words appearing in clause 5 of the SSSBC Agreement 1 of 2010 must be attributed their ordinary, literal and grammatical meaning. It is only if there is an ambiguity in the plain language that an additional approach to interpretation becomes necessary".

⁴ See *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) 767E-768E where Joubert JA said: "According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument.....the mode of construction should never be to interpret the particular word or phrase in isolation (*in vacuo*) by itself.....The correct approach to the application of the golden rule of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

- (1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract;
- (2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted.....;

to employ the grammatical and ordinary meaning of the words as a means to that end.⁵ The commissioner was therefore correct, as a starting point, in seeking to discern the parties' intention by attempting to give effect to the plain grammatical language used in clause 5.⁶ However, if one has to discern the intention of the parties by giving effect to the words used in clause 5, one arrives at a completely different conclusion. Quite clearly, when the parties made reference to "*normal overtime*" their intention was for that phrase to bear a grammatical meaning akin to "usual or customary or ordinary" as defined in the Oxford English Dictionary when that phrase is not read in isolation but is read within the context of the entire clause 5.⁷

- [19] In the event that the commissioner felt that giving effect to the words in clause 5 would lead to absurdity, then he would have had to modify such words sufficiently so that they accord with the intention of the parties.⁸ The commissioner may therefore have adopted a correct approach to interpretation but the conclusion that he reached is not supported by the approach he adopted. Clearly the commissioner was not happy with the choice of words in clause 5 thus:

‘This matter underscores the need for the parties to negotiate agreements carefully and to record them in clear and precise terms, as there is no specific reference to payment of overtime on Public Holidays contained in SSSBC Agreement 1 of 2010.’

- [20] This is where the commissioner ought to have stepped in and modified the phrase "*normal overtime*" so that it accords with the intention of the parties and that is, for such phrase to mean "*usual overtime*" when read in the entire context of clause 5 and

⁵ See R H Christie, *The Law of Contract in South Africa* 6th ed (Lexis Nexis 2001) at 217

⁶ See *Engelbrecht v Senwes Ltd* 2007 (3) SA 29 (SCA) (7); See also *Hansen, Schrader & Co v De Gasperi* 1903 TH 100 at 103 where Solomon J observed: "Now it is not for this court to speculate as to what the intentions of the parties were when they entered into the contract. That must be gathered from their language, and it is the duty of the Court as far as possible to give to the language used by the parties its ordinary grammatical meaning."

⁷ See *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) 646B where Jansen JA remarked: "The first step in construing a contract is to determine the ordinary grammatical meaning of the words used by the parties (*Jonnes v Anglo- African Shipping Co (1936) Ltd*, 1971 (2) SA 827 (AD) at 834E. Very few words, however bear a single meaning, and the ordinary meaning of words appearing in a contract will necessarily depend upon the context in which they are used, their interrelation and the nature of the transaction as it appears from the entire contract....."

⁸ See R H Christie, 6th Edition at 218 and *Gravenor v Dunswart Iron Works* 1929 AD 299 & 303; *Boerne v Harris* 1949 (1) SA 793 (A) 804-805

not in isolation.⁹ It is clear that, in view of the fact that the 2007 agreement uses the phrase “*normal overtime*” as one of the three types of overtime, the choice of the same word in clause 5 with the intention to exclude all three types of overtime was disingenuous as it only serves to create confusion which could have been avoided by the use of a different phrase such as “*usual or ordinary overtime*”. Be that as it may, I am more than satisfied that, as unfortunate as it is, that phrase could still have been modified so that it accords with the intention of the parties.

- [21] Perhaps the very fact that, as the commissioner observed, there is no reference to payment of overtime on public holidays and, I would add, nor reference to payment of overtime for duties performed on Sundays, ought to have flashed a red light to the commissioner as then the only reasonable inference would be that the use of the phrase “*normal overtime*” was not in reference to the type of overtime as contemplated in the 2007 agreement but intended to convey the exclusion of usual or ordinary overtime including all forms of overtime. The commissioner could have done better.
- [22] In fact, a careful reading of clause 5 reveals something more. I could not help but to observe that the phrase in dispute reads “*the normal overtime prescript(s) relating to the payment of overtime are not applicable*”. Prescript is in plural rather than singular and I would imagine that if the parties intended to exclude only normal overtime they might as well have used a singular “*normal overtime prescript*” as then it could be argued that the phrase was in reference to the type of overtime contemplated in the 2007 agreement. So the use of a plural as opposed to a singular might very well denote the exclusion of all three types of overtime and not just one. I must hasten though to point out that this is a mere observation and does not in any way form part of my reasoning as it was not advanced in argument. It is further unnecessary for me to

⁹ See *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458, 465-466 where Wessels CJ observed: “It has been repeatedly decided in our Courts that in construing every kind of written contract the Court must give effect to the grammatical and ordinary meaning of the words used therein. In ascertaining this meaning, we must give to the words their plain, ordinary and popular meaning, unless it appears clearly from the context that both the parties intended them to bear a different meaning. If, therefore, there is no ambiguity in the words of the contract, there is no room for a more reasonable interpretation than the words themselves convey. If however, the ordinary sense of the words necessarily leads to some absurdity or to some repugnance or inconsistency with the rest of the contract, then the Court may modify the words just so much as to avoid that absurdity or inconsistency but no more.”

decide this point in light of the view I have taken on the interpretation of the phrase '*normal overtime*'.

- [23] In my view, there is no uncertainty with regard to the words and phrases used in clause 5, there is certainly no ambiguity that I can even possibly imagine unless I, like the commissioner, were to read the phrase '*normal overtime*' in isolation and I refuse to do so. But as I have already said, even if that phrase was not so clear, there was nothing preventing the commissioner from modifying the phrase to accord with the intention of the parties. Moreover, as it was said in *Coopers*, one also has to look at the context and purpose as well as the genesis of the contract.
- [24] There is no doubt that the whole point of concluding the 2010 agreement was to do away with the administrative burden associated with all three types of overtime contained in the 2007 agreement, especially where the recording, verification and capturing of the number of overtime hours worked at major events became a nightmare and therefore almost impossible to administer.
- [25] If the purpose of concluding the 2010 agreement was precisely to do away with this kind of administrative burden, how then could it be possible that, when the parties concluded the 2010 agreement, they would only make reference to "*normal overtime*" and exclude the other types of overtime, i.e. overtime for duties performed on a public holiday and overtime for duties performed on a Sunday when in fact all three types of overtime caused the same administrative burden resulting in the conclusion of the 2010 agreement? That just doesn't make sense.
- [26] It is clear from his award that the commissioner never applied his mind to the purposive approach as a canon of interpretation as his conclusion is not supported by the spirit and purport of the 2010 agreement. Had the commissioner applied his mind to the purpose and spirit of the 2010 agreement, he no doubt would have found that, if the purpose of the 2010 agreement was to do away with the administrative burden associated with all three types of overtime, it then could not be that, in concluding the 2010 agreement, the parties would have made reference only to the normal overtime

and exclude the other two types of overtime as if it was only the normal overtime which caused administrative burden and not the other two.

- [27] This is especially so because, I cannot, for one moment, imagine a situation where, during major events, classified as special events, which fall on an ordinary day which is neither a Sunday or public holiday, an employee is not required to record the number of overtime hours worked so as to avoid the administrative burden but then strangely enough, at another special event which happens to fall on a Sunday or public holiday then the same employee is now required to record the number of hours of overtime worked in order to be paid for overtime worked.
- [28] If this were to be the case, one would then wonder as to what was the rationale behind the 2010 agreement if the applicant would still be burdened with having to capture the precise number of hours worked during the performance of overtime duties. It simply does not make sense. Were this to have been the intention of the parties, I have no doubt that they would have recorded such in clearer terms than what clause 5 reveals. I am therefore of the view that, over and above, the ordinary grammatical meaning of clause 5 which clearly reveals the intention of the parties, i.e. to dispense with all three types of overtime, when regard is had to the context and purpose of the 2010 agreement, clause 5 must be interpreted to exclude all three types of overtime in instances where the converted non-pensionable special daily overtime allowance is payable.
- [29] There is a further reason why in scrutinizing the award, especially clause 5 thereof, this Court should not lose sight of the contextual and purposive interpretation and that is, what the commissioner was dealing with in essence was a collective agreement which, unlike ordinary commercial contracts, ought to be interpreted with a view to promote effective, fair and speedy resolution of labour disputes.¹⁰ I therefore align myself to the view expressed by Froneman DJP (as he then was) in *North East Cape Forests* decision and that is, the primary objects of the LRA are better served by a

¹⁰ See *North East Cape Forests v SAAPAWU and Others* [1997] 6 BLLR 711 (LAC); *SA Municipal Workers Union v SA Local Government and Others* (2012) 33 ILJ 353 (LAC).

practical approach to the interpretation and application of the collective agreement such as the 2010 agreement than by purely commercial principles.

- [30] To apply strict commercial principles when interpreting collective agreements would simply frustrate collective bargaining and further defeat the very purpose of the LRA. Having said so, I am however, not ignorant of what was said by Zondo JP in the *Technikon SA* decision, where the learned JP cautioned against the use of purposive interpretation as a license to ignore the language used in the statute being the subject of interpretation.¹¹ I agree with the sentiments expressed by Zondo JP but only to the extent that, where the language sought to be interpreted in a contract or statute is clear and reveals the common intention of the parties and does not lead to absurdity, there can be no justification for invoking purposive interpretation for such would be subverting the common intention of the parties by travelling outside the instrument.
- [31] I have decided to mention the *Technikon SA* decision because it seems to offer a different perspective from the *North East Cape Forests* decision which preceded it but in my view the two decisions are not mutually exclusive. I say this because, I doubt very much that in the *North East Cape Forest* decision, Froneman DJP was advocating a disregard of ordinary and grammatical meaning in the exercise of interpretation of collective agreements. My understanding of his words is that, not too much emphasis should be placed on the literal meaning so as to frustrate the object of the LRA and to the complete disregard of purposive interpretation. There needs to be a healthy balance between the two approaches to interpretation.
- [32] Be that as it may, Zondo JP's caution against overreliance on purposive interpretation is of no consequence in *casu* as I have found that, quite apart from the context and purpose of the 2010 agreement, the ordinary and grammatical meaning of clause 5, especially the phrase '*normal overtime*' is such that the intention of the parties when concluding the 2010 agreement was to exclude all three types of overtime where the converted non-pensionable special daily overtime allowance is payable.

¹¹ *Technikon SA v National Union of Technikon Employees of SA* (2001) 22 ILJ 427 (LAC).

[33] That, even if the phrase '*normal overtime*' is somewhat nonsensical in the context of the 2007 agreement, it could still have been modified so as to accord with the common intention of the parties. For the sake of convenience and clarity, the crux of this decision is that, both literal and purposive interpretation of clause 5 reveal the common intention of the parties to exclude all three types of overtime where the converted non-pensionable special daily overtime allowance is payable. For this reason, it is my well-considered view that the award is not a decision which a reasonable decision-maker could have reached with the result that it must be reviewed and set aside. I am also mindful of the pressing need for clarity around the proper interpretation of clause 5 and for that reason I do not intend to make any order as to costs.

Order

[34] In the premises, I make the following order:

34.1 The award is reviewed and set aside;

34.2 Clause 5 of SSSBC Agreement 1 of 2010 excludes all three types of overtime as contemplated in the SSSBC Agreement 4 of 2007 where the converted non-pensionable special daily overtime allowance is payable, regardless of whether the special event falls on a public holiday;

34.3 There is no order as to costs.

Zondo AJ

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT:

Adv M J Ramaepadi

Instructed by State Attorney-Johannesburg

FOR THE THIRD RESPONDENT:

Adv J L Basson

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FOR THE FOURTH RESPONDENT:

Adv P H Kirstein

 Instructed by Van der Merwe Du Toit Inc

LABOUR COURT