



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 293/2020

In the matter between:

MANTSOPA LOCAL MUNICIPALITY

Applicant

and

SAMWY obo TSEKOE & 34 OTHERS

First Respondent

JM DLENGEZELE N.O

Second Respondent

**SOUTH AFRICAN LOCAL
GOVERNMENT BARGAINING COUNCIL**

Third Respondent

Heard: 28 June 2024

Delivered: 30 January 2025

JUDGMENT

SONO, AJ

Introduction

[1] Before the Court are 3 applications being -

1.1 An unopposed condonation application for the late filing of the review application brought by the Applicant; and

1.2 an opposed review application brought in terms of section 145 of the Labour Relations Act¹ (with an order to stay the enforcement of the arbitration award dated 30 September 2019 (the Award));

1.3 and an opposed application brought by the First Respondent in terms of Rules 7 and 11² seeking the order to have the review application dismissed.

[2] In the opposed review application, the Applicant primarily seeks to have the Award reviewed and set aside alternatively for the matter to be remitted back to the Third Respondent, the South African Local Bargaining Council, to be determined by another arbitrator other than the Second Respondent.

[3] Because the review application is interwoven with the Applicant's condonation application, naturally, this Court will have to first adjudicate on the condonation application and, only if the condonation application is granted, will it have jurisdiction to adjudicate on the review application.

Background facts

[4] The material facts relevant in this dispute are largely common cause. The Applicant is a municipality and an organ of the state in the local government sphere regulated by the Local Government Municipal Systems Act³.

¹ Act 66 of 1995, as amended.

² GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court, repealed with effect from July 2024.

³ Act 32 of 2000.

[5] The First Respondent, SAMWU, acts on behalf of its members who were employees of the Applicant (at least at the time of the dispute).

[6] Pertinently the dispute revolves around 3 categories of employees the first being 29 employees who were employed as Process Controllers, the second being 2 Security Officers and the third being 4 employees employed as Firefighters.

[7] The Parties⁴ were bound by a collective agreement titled the "*Collective Agreement for The Free State Division of the SALGBC*" (the Collective Agreement). At the heart of the dispute between the parties is the interpretation of clauses 20.1, 20.2 and 20.3 of the Collective Agreement which clauses read as follows -

'20 PAYMENT OF FIXED ALLOWANCE

20.1 All personnel working Shifts within the Municipalities will be paid a monthly fixed allowance. For purposes of this Agreement the term "Operational Personnel" refers to those officials who are required to work shifts as agreed to by the parties and includes all operational personnel working in the Municipalities in the Free State Province.

42 Hour Working Week (4 Shifts)

20.1.2 This inclusive fixed monthly shift allowance will be paid at a rate of 27% of each of the concerned employees' basic salary, e.g. if an employee earns a basic salary of R120 000-00 on a specific scale, he earns a basic monthly salary of R10 000-00 this employee will then be paid an additional R2 700-00 per month as a fixed allowance of 27%.

20.1.3 The inclusive fixed monthly shift allowance will be paid in consideration of and in lieu of the following:

- Payment for the scheduled overtime (those hours exceeding the agreed upon 40 hours per week) worked by operational personnel as part of 42 hour rotational 4 shift system (42 hour week), i.e the additional 2 hours per week (over and above the 40 working hours which constitute these officials normal average weekly working hours);

⁴ The Applicant and the First Respondent's members.

- Payment for work performed on Sundays as prescribed by the BCEA (as part of scheduled shift);
- Payment for work performed during night hours between the hours of 18H00 and 06H00 as prescribed by the BCEA and the Divisional Collective Agreement;
- Payment for work performed during meal intervals as prescribed by the BCEA;
- Payment for any other form of shift allowance which may have been payable to any shift workers for which may have existed before the conclusion of this agreement.

...

20.2 56 Hour Working Week (3 shifts)

Working of a 56 hour working week, three (3) shift system, shall only be applicable to operational employees performing a twenty four hour, seven days per week service.

20.2.1 This inclusive fixed monthly shift allowance will be paid at a rate of 48% of each of the concerned employees' basic salary...

20.2.2 This inclusive monthly shift allowance will be paid in consideration of and in lieu of the following:

- Payment for the scheduled overtime (those hours exceeding the agreed upon 40 hours per week) worked by operational personnel as part of a 56 hour rotational 3 shift system (56 hour work week) i.e the additional 16 hours per week (over and above the 40 hours which constitute these officials normal average weekly hours);
- Payment for work performed on Sundays as prescribed by the BCEA (as part of scheduled shift);
- Payment for work performed during night hours between the hours of 18H00 and 06H00 as prescribed by the BCEA and the Divisional Collective Agreement;
- Payment for work performed during meal intervals as prescribed by the BCEA;

- Payment for any other form of shift allowance which may have been payable to any shift workers for which may have existed before the conclusion of this agreement.

...

20.2 84 Hour Working Week (2 shifts)

Working of a 84 hour working week, three (4) shift system, shall only be applicable to operational employees performing a twenty four hour, seven days per week service.

20.2.1 This inclusive fixed monthly shift allowance will be paid at a rate of 27% of each of the concerned employees' basic salary...

20.2.2 This inclusive monthly shift allowance will be paid in consideration of and in lieu of the following:

- Payment for the scheduled overtime (those hours exceeding the agreed upon 40 hours per week) worked by operational personnel as part of the 84 hour; rotational 2 shift system (84 hour work week) i.e the additional 42 hours per week (over and above the 40 hours which constitute these officials normal average weekly hours);
- Payment for work performed on Sundays as prescribed by the BCEA (as part of scheduled shift);
- Payment for work performed during night hours between the hours of 18H00 and 06H00 as prescribed by the BCEA and the Divisional Collective Agreement;
- Payment for work performed during meal intervals as prescribed by the BCEA;
- Payment for any other form of shift allowance which may have been payable to any shift workers for which may have existed before the conclusion of this agreement.'

[8] The parties disagree on the correct interpretation to be accorded to the aforementioned clauses. On or about 6 August 2018, SAMWU referred a dispute to the Third Respondent concerning the interpretation or application of clause 20 of the Collective Agreement seeking, as relief, the "[r]etropective implementation of clause

20.3 of the same agreement as employees of the [Applicant] and [that] the [Applicant] work 2 and 3 shifts".

[9] The dispute was arbitrated by the Second Respondent acting under the auspices of the Third Respondent who issued the impugned Award. In the Award the Second Respondent concluded that given his interpretation -

9.1 The members of the First Respondent were entitled to 48% and 72% retrospectively;

9.2 The Applicant is ordered to place the members of the First Respondent in their appropriate fixed monthly shift allowances in line with the hours worked in a shift outlined above;

9.3 The application of the aforementioned fixed shift allowance shall commence retrospectively from 1 November 2016 for Process Controllers, August 2018 for Security Officers and July 2019 for Firefighters.

[10] Dissatisfied with the aforementioned Award, the Applicant instituted the review proceedings forming the subject matter of this application. The Applicant's grounds of review are, *inter alia*, that -

10.1 The Second Respondent committed a serious/material error of law when he found that the First Respondent's Members are entitled to a fixed monthly shift allowance of 48% and 72% in line with their working hours;

10.2 The Second Respondent committed a serious/material error of fact when he found that the First Respondent's Members are entitled to a fixed monthly shift allowance of 48% and 72% in line with their working hours; and

10.3 No reasonable decision maker faced with the same facts, evidence and arguments would have arrived at the conclusion reached by the Second Respondent.

[11] As mentioned above, before this Court can adjudicate on the merits of the review application it has to adjudicate firstly on the condonation application because if the condonation application is not granted, the Court will lack the jurisdiction to deal with the review application.

Condonation application

[12] On 19 August 2021, the Applicant delivered its condonation application for the late filing of the review application. This application is not opposed.

[13] I have considered the Applicant's condonation application together with the relevant authorities on condonation and I am of the view that while the delay is somewhat lengthy, it cannot be characterised as egregious. Furthermore, the explanation given by the Applicant is reasonable and acceptable and the Applicant has demonstrated that it has prospects of success. Seeing that the condonation application is not opposed, neither of the Respondents will be prejudiced should this Court grant it or if any party were to suffer prejudice, relevant facts have not been placed before court by either party.

[14] Furthermore, it is clear that there is a public interest consideration in this matter. The employees are employed by the Applicant. Thus, public monies are involved. If the Second Respondent's interpretation is incorrect the employees will receive an allowance which they are not entitled to which will come from the public purse. In my view this would be an injustice to the public and the public purse. The converse is also applicable, if the employees are entitled to the allowance at the rate decided upon by the Second Respondent, then it is not for this Court to lay supine when there might be an injustice.

[15] Moreover, it is in the interest of justice that the merits of this case be fully and finally determined. Closing the door on the Applicant this late in the matter, where the matter is not opposed will not, in my view, be in the interest of justice. I reiterate that it is in the interest of justice that this matter be effectively⁵ and expeditiously resolved in line with the purpose of the Labour Relations Act⁶ especially as it concerns an all-important issue as to how a provision of collective agreement should

⁵ See section 1(d)(iv) of the LRA.

⁶ Act 66 of 1995, as amended.

be interpreted. Therefore, the condonation application is granted and the Court will proceed to deal with the merits of the review application.

Applicable principles

[16] As is clear from above, this matter involves the interpretation and application of clause 20 of the Collective Agreement.

[17] Our Courts have laid down the principles and considerations applicable to the resolution of disputes concerning the interpretation and application of collective agreements. This Court, per Tlhotlhamajane J, in *BIFAWU obo Members v Commission for Conciliation, Mediation and Arbitration and Others*⁷ (*BIFAWU*) aptly summarised the applicable principles as follows -

[15] In accordance with the provisions of section 23 of the LRA, collective agreements are binding on the parties. The purpose of section 24 of the LRA is to resolve disputes where a party to an agreement is alleged to have been in breach of the provisions of that agreement by failing to interpret or apply its terms either correctly or at all. The principles applicable to the resolution of such disputes are trite as restated in *Western Cape Department of Health v Van Wyk and Others*. These are that;

- i. When interpreting a collective agreement, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract, and he/she is therefore required to consider the aim, purpose and all the terms of the collective agreement;
- ii. The primary objects of the LRA are better served by an approach which is practical to the interpretation of such agreements, namely to promote the effective, fair and speedy resolution of labour disputes. In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.

⁷ [2018] ZALCJHB 303.

iii. A collective agreement is a written memorandum which is meant to reflect the terms and conditions to which the parties have agreed at the time that they concluded the agreement.

iv. The courts and arbitrators must therefore strive to give effect to that intention, and when tasked with an interpretation of an agreement, must give the words used by the parties their plain, ordinary and popular meaning if there is no ambiguity. This approach must take into account that it is not for the Courts or arbitrators to make a contract for the parties, other than the one they in fact made;

v. The “parole evidence” rule when interpreting collective agreements is generally not permissible when the words of the memorandum are clear.

vi. Collective agreements are generally concluded following upon protracted negotiations, and it is expected of the parties to those agreements to remain bound by their provisions. It therefore follows that such agreements cannot be amended unilaterally.’

[18] In addition, the Court also encapsulated the test applicable to review applications. In this regard, I refer again to the *BIFAWU* decision *supra* wherein it was said -

[16] The test on review is well-established, and for an applicant to be successful, the Court must be persuaded that the award or the decision arrived at by the Commissioner is one that a reasonable decision maker would not have made in the light of the material presented to him or her. The enquiry is not whether the decision is correct or not, but whether the Commissioner properly applied her mind to the issues before her, considered all the material before, and adopted an approach that gave effect to the purpose of the provisions of the agreement. As it was stated in *Ekurhuleni Metropolitan Municipality v South African Municipal Workers Union and Others*,

“...The test is concerned with outcomes, not the process by which the outcomes are achieved. Only when the outcome is one which no reasonable arbitrator, with the material that was to hand, could produce, is an award liable to be set aside. The frailties of an arbitrator’s reasoning, or inattention to mentioning every facet of relevance, or clumsiness in articulation are unimportant, unless they are causally connected to an unfair outcome.”

Evaluation

[19] It is trite that parties are bound by their pleadings. Therefore, the starting point in this application is the founding affidavit read together with the answering affidavit to find out exactly where the parties cannot find each other.

[20] What is clear from the pleadings is that it is common cause that Process Controllers work 3 rotational shifts of 8 hours while Security Guards and Fire Fighters work 2 rotational shifts of 12 hours.

[21] Furthermore, it is clear from the pleadings read with the record that the main issue between the parties is under which category in the fixed allowance do the 3 categories of employees fall i.e whether they fall within the 42-hour working week, the 56-hour working week or the 84-hour working week for the two shift system. Clauses 20.1 to 20.3 are at play.

[22] In my view, clauses 20.1.2 to 20.1.5 are not applicable as none of the employees involved in this matter work a 4-shift system.

[23] Clause 20.2 is applicable concerning Process Controllers who work a 3-shift system. Mr Abel Mojalefa Miya (Mr Miya) testified on behalf of the First Respondent before the Second Respondent that Process controllers work a 3-shift system of 8 hours per shift and that therefore they fall under clause 20.2. He explained further that Process Controllers work a 56 hour working week calculated by taking 56 and dividing it by seven (which is the working week) which equals the 8 hour shift. This evidence was not disputed. In fact, this evidence is in line with the employer's own witness, Mr Joseph Martinus van der Westhuizen (Mr van der Westhuizen) who testified that employees on a 3-shift system work an average of 56 hours per week.⁸ Therefore the Second Respondent cannot be faulted for the conclusion reached that

⁸ Record - Page 301 Line 23 to 25 and Page 302 Line 1 to 2.

Process Controllers fall within the 3-shift 56-hour working week in terms of clause 20.2 of the Collective Agreement.⁹

[24] Security Guards and Firefighters work a 2-shift system of 12 hours per shift. Thus, clause 20.3 is at play. Mr Miya testified that Security Guards and Firefighters fall within clause 20.3 and therefore work an 84 hour work week. He did this by taking 12 hours per day and multiplying it by 7 equals 84. Further, if one were to take 84 (the average working week) and divide it by 7 days it would equal 12, which is the shift Security Guards and Firefighters are required to work. This again tallies with Mr van der Westhuizen's testimony that a 2 shift system works an average of 84 hours per week.¹⁰ Again it follows that the Second Respondent cannot be faulted for the conclusion reached that Security Guards and Firefighters fall within clause 20.3 and are therefore entitled to 72% fixed monthly shift allowance.

[25] In my view, the Collective Agreement ought to be understood as follows -

25.1 Clause 20.1 of the Collective Agreement states that "*All personnel working Shifts within Municipalities will be paid a monthly fixed allowance*". The text of this clause is quite clear. If an employee works a "*Shift*" (as defined) he/she is entitled to a fixed monthly allowance. As stated above, it is common cause that Process Controllers, Security Guards and Firefighters all work rotational shifts.

25.2 What constitutes a shift is defined as follows in the Collective Agreement -

"Shift" - means where an employee is required to work for a specific period of time on a rotational shift system with an average of either 42 hours, 56 hours or 84 hours per working week respectively, whereby twenty-four hours, seven days a week (24/7) municipal service is rendered.' (emphasis added)

[26] There are 3 elements or requirements in terms of the definition. Firstly, an employee must be required to work a rotational shift system. Secondly, the rotational

⁹ Pleadings Bundle - Page 29 (Arbitration Award at paragraph 42).

¹⁰ Record - Page 307 Line 19 to 25 read with Page 308 Line 1 to 8.

shift system the employee is working must amount to an average of either 42 hours, 56 hours or 48 hours per working week. Thirdly, the service rendered by the employee must be one that is rendered twenty-four hours seven days a week.

[27] Once the aforementioned definitional requisites have been met then one proceeds to look at clause 20 of the Collective Agreement. The natural starting point will be the number of shifts that a category of employees are required to work i.e. are they working 4 shifts, 3 shifts or two shifts.

[28] From clause 20, it is clear that a 42-hour working week relates to 4 shifts. 24 hours divided by 4 equals 6 (six). An employee working a 4-shift system works 6 hours a day. Because the Municipal Service must be rendered for 7 days it follows that the 6 must be multiplied by 7 and that is an average of 42 hours working week. The fact that a particular employee would be off at some point is neither here nor there. Does it mean that when an employee is off duty the Applicant deducts the days not actually worked from their remuneration? Being off duty at some point does not, in my view, affect the calculation to determine an average hour working week. The emphasis is on "a rotational shift system with an average [working week]" and not on the actual hours (hours on duty) worked by an employee.

[29] Likewise, if an employee is working a 3-shift system, the same principle applies. 24 hours divided by 3 equals 8 hours an employee is required to work. 8 multiplied by 7 equal to 56 hours, just as set out in clause 20.2 of the Collective Agreement. Lastly, the same principle applies to an employee working a 2-shift system. 24 hours divided by 2 equals 12. 12 multiplied by 7 equals to 84.

[30] The aforementioned accords with the interpretation given by the Second Respondent and the text of clause 20. Therefore, I find that the interpretation the Second Respondent gave is not only correct but an interpretation that a reasonable decision-maker could have reached.

30.1 Turning to the order requesting the stay of the enforcement of the Award, I believe that this order has been overtaken by events in that the First Respondent did not move to enforce the Award pending the hearing. Thus, this issue has become moot.

[31] Lastly, turning to the dismissal application brought by the First Respondent in terms of Rule 11 of this Court's Old Rules, I find that it will be unnecessary to adjudicate upon it in light of the conclusion reached herein. Similarly, it has become moot and of no moment.

[32] Turning to the issue of costs, given the continuing relationship between the parties, I deem it in the interest of justice and equity not to grant costs.

[33] In light of the aforesaid, I make the following orders –

Order

1. The condonation application is granted;
2. the review application is dismissed;
3. the Rule 11 application is dismissed; and
4. there is no order as to costs.

B Sono

Appearances:

For the Applicant: R Schmidt
Instructed by: Matlho Attorneys

For the First Respondent: T Du Preez
Instructed by: Kramer Weihann Inc.