

IN THE LABOUR COURT OF SOUTH AFRICA
(Held at Johannesburg)

Case No: J 3128/01

In the matter between:

THE PROFESSIONAL TRANSPORT WORKERS

First Applicant

Second Applicant

THIRD AND FURTHER APPLICANTS LISTED

and

First Respondent

Second Respondent

JUDGMENT

Landman J:

1.The Professional Transport Workers Union and some of its members apply for a mandamus, inter alia, to compel Magnum Security (Pty) Ltd to pay the individual employees the difference between what they were paid since 20 March 2001 and what they would have been paid had they worked 60 hours per week.

2.The application is brought in terms of s 77(3) of the Basic Conditions of Employment Act 75 of 1997 (the BCEA) which reads:

“The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.”

3.Magnum objects to the matter being heard on several grounds. The heads of argument reduce them to essentially one

point, namely, that the applicants have forfeited their right to litigate the dispute in this court.

4.It is submitted that as the applicants had referred the dispute labeled “a unilateral change in terms and conditions of employment” to the CCMA in terms of s 64 (4) of the Labour Relations Act 66 of 1995 they were limited to enforcing their claim through power play.

5.This contention cannot be correct as regards the notice in the referral form advising Magnum not to implement unilaterally the proposed changes that led to the dispute for 30 days or that it restore the terms and conditions that applied before the change. The notice creates an obligation on Magnum to comply with it. If the obligation is disregarded the employees can invoke the assistance of the court. The court frequently deals with such matters. Of course, a period of more than 30 days has lapsed and, as the dispute is a dispute of right adjudicable in terms of the BCEA, there is no reason why the court’s jurisdiction is ousted.

6.In order to succeed the applicants must establish a clear right. This means that the applicants must each show that as at 6 March 2001:

(a)a contract of employment existed between them and Magnum.

(b)Magnum agreed that they were entitled and obliged to work 60 hours per week; consisting of 50 ordinary hours and 10 overtime hours.

(c)they worked or tendered to work those hours.

(d)Magnum failed to pay them the full amount due to them for a 60 hour week.

(e)the difference between what they were paid and should have been paid.

7.It does not appear that the elements in paragraphs (a), (c) and (d) are in dispute. The relief in (e) can be established at a later stage. The case therefore turns on paragraph (b).

8.It is common cause that immediately prior to 6 March 2001, the agreed working hours of all the individual applicants were 60 per week; 55 of which were ordinary hours and 5 of which were overtime. It was, however, permissible to work up to 10 hours overtime.

9.With effect from 6 March 2001, the permissible working hours prescribed in the sectoral determination were altered

to 50 ordinary hours per week. It was still permissible to work 10 hours overtime. The reduction in the ordinary hours of work was in pursuance of s 9 (3) read with Schedule 1 of the BCEA. The reduction in working hours has the effect that the wages of employees, if they are paid per hour, will fall unless the hourly rate is bargained upwards and/or more than the agreed 5 hours of overtime are worked.

10. The contractual arrangement between the employees and Magnum was concluded within the context of a statutory framework, i.e. the BCEA. It was probably impliedly agreed that a minor change to working hours brought about by a determination such as Sectoral Determination 3: Private Security Sector, South Africa would not terminate the contract, but could affect it.
11. The effect of the determination was to reduce the ordinary hours of work from 55 to 50. Neither the employees nor Magnum can complain about this. They are obliged to reduce the ordinary hours to 50 per week. They may of course agree to work for a lesser period.
12. The determination does not affect the legality of an agreement (whether standing alone or part of a contract of employment) which compels the employees to work overtime of 5 hours per week. The agreement to work 5 hours overtime per week (on the assumption that there is such an agreement) is left unscathed and remains valid and enforceable as it is still within the permissible 10 hours.
13. The effect of this is that the applicants may be entitled to a declaration that they are entitled to be paid for 5 hours overtime per week as from 20 March 2001 and an alleged shortfall in ordinary working hours. They are not entitled to a declaration that their contract obliges them to work 60 hours per week.
14. This reasoning rests on the assumption that the employees 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. But Magnum admits that "the agreed working hours of all the individual applicants was 60 per week." The applicants have not attached copies of the agreements nor provided any details of oral agreements.
15. Magnum alleges that after the latest sectoral determination was promulgated an agreement was reached with the employees to work only 48 hours per week, i.e. 2 hours less than the maximum ordinary hours permissible and no overtime. The applicants deny that such an agreement was reached.
16. Applying the usual test for deciding disputes of fact on paper in an application for final relief, I must find against the applicants.

17. The resolution of the dispute, however, is one which is important to the employees, Magnum, other members of the PTWU, other unions and other employers in the industry. In the circumstances it seems to me to be appropriate to refer the matter for oral evidence as a matter of priority. Therefore:

1. The matter is referred to oral evidence on whether the employees, who are applicants, have separately or otherwise entered into an agreement with Magnum prior to 6 March 2001 which entitles them to work a specified number of hours per week.*

2. A list of witnesses and an accurate summary of their evidence is to be exchanged within 10 days of this order.

3. Any additional documents which are to be used in evidence must likewise be exchanged within 10 days of this order.

4. The costs of the hearing on 5 September 2001 are reserved.

5. The Registrar is directed to enroll the matter as a matter of priority in consultation with the parties.

Signed and dated at BRAAMFONTEIN this 7th day of September 2001.

Landman J

Judge of the Labour Court of South Africa

* Order amended on 16 November 2001 at the request of the parties.

5 September 2001

7 September 2001

C Todd, *Bowman Gilfillan Inc.*

: C Short, *Sampson Okes Higgins Inc.*

t: P Bester, *Blake Bester*