IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO **D243/04**

Date of Hearing: 2004/11/03

Date of Judgment: 2005/01/27

In the matter between

ENFORCE GUARDING (PTY) LTD

APPLICANT

and

MINISTER OF LABOUR **1ST RESPONDENT**

DIRECTOR-GENERAL - DEPARTMENT OF LABOUR **2ND RESPONDENT**

NATIONAL SECURITY & UNQUALIFIED WORKERS UNION **3RD RESPONDENT**

SA TRANSPORT & ALLIED WORKERS UNION **4TH RESPONDENT**

SECURITY & ALLIED TRADE UNION OF SA **5TH RESPONDENT**

NATIONAL SECURITY WORKERS UNION **6TH RESPONDENT**

EMPLOYEES WHO ARE NOT MEMBERS OF ANY OF THE AFORESAID RESPONDENTS **7TH & FURTHER**

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JUDGMENT DELIVERED BY
THE HONOURABLE MR ACTING JUSTICE NGCAMU

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FOR THE APPLICANT: MR G O VAN NIEKERK SC

FOR THE 1ST &
2ND RESPONDENTS: MR M J D WALLIS SC

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JUDGMENT

NGCAMU AJ

[1] This is an application for the review of the decision of the second respondent in refusing the variation of clause 5(9) of the sectoral determination No 3 applicable to the security industry.

[2] The application is opposed by the first and second respondents.

[3] The applicant is involved in the security industry. In February 2000 the Minister of Labour made a sectoral determination to regulate the working hours in the security industry. The sectoral determination reduced the number of ordinary hours to be worked first from 60 to 55 hours per week and later to 50 hours per week. Overtime was limited to 10 hours per week. A further important item introduced was the payment for overtime at 1,5 per hour, the ordinary hours of work.

[4] The introduction of the sectoral determination put the applicant in a dilemma as it had a shift of five days in and two days off. This was costly to the applicant if it had to maintain 60 hours per week. The applicant suggested to the employees payment of 1,25. The suggestion was embraced by the unions. The third respondent did not participate as it did not have the mandate to sign the agreement from members.

[5] The applicant accordingly made an application for the variation in terms of section 50(7)(b) of the Basic Conditions of Employment Act when the third respondent did not sign the agreement.

[6] The application was refused by the second respondent on the basis that the conditions of employment should not be less favourable to the employees. The applicant had two options open to it. It was either to comply with the sectoral determination or approach the Court for a review of the decision.

[7] The applicant set out the three grounds for the review of the decision. This will be dealt with in this judgment. Section 50 of the Basic Conditions of Employment Act allows the Minister of Labour to make a sectoral determination. These sectoral determinations form part of the Act and may therefore be varied by the Minister. The Act is defined as to include the schedules and the regulations made under the Act. The Minister is therefore entitled to vary any condition of employment by means of a sectoral determination applicable to a particular sector. I now deal with the grounds of review, as set out by the applicant.

[8] The applicant has submitted as its first ground of review that in terms of section 50(1) of the Basic Conditions of Employment Act it is the Minister of Labour who must determine whether a variation ought to be granted. In the present case it is the second respondent who refused the application. It was therefore submitted that there was no

proper delegation of authority by the Minister to the second respondent and, accordingly, the second respondent's decision was unlawful and should be reviewed.

[9] Section 85(1) of the Basic Conditions of Employment Act provides that:

> "(1) The Minister may in writing delegate or assign to the Director-General or any employee in the Public Service of the rank of Assistant Director or of a higher rank any power or duty conferred or imposed upon the Minister in terms of this Act, except the Minister's powers in terms of sections 6(3), 55(1), 60, 83, 87 and 95(2) and the Minister's power to make regulations."

[10] The Minister, acting in terms of section 85(1), delegated his powers to the second respondent to make a variation in terms of section 50. The fact that the delegation has been made by the Minister is not in dispute.

[11] Annexure MBD1 on page 140, being the delegation, set out the guidelines for those exercising the delegated authority. It was argued on behalf of the applicant that the schedule MBD2 does not provide for the variation concerning payment of overtime in terms of section 10(1) of the Basic Conditions of Employment Act. It was also submitted that it does not provide for payment of overtime. Accordingly,

it was submitted the Director-General did not have authority.

[12] I do not agree with the submission made by Mr *van Niekerk SC*, for the reasons that follow. The Minister, on document MBD1, specifically stated that he delegated the powers vested in him to make determinations (variations) in terms of section 50(1) on the basis as contained in the schedule. The delegation covers the whole of section 50(1). This section provides:

> "The Minister may, if it is consistent with the purpose of this Act, make a determination to replace or exclude any basic condition of employment provided for in this Act in respect of ..."

In terms of this section, any basic condition of employment may be replaced or excluded.

[13] In the document MBD1 the Minister set out the guidelines regarding certain section of the Basic Conditions of Employment Act. The Minister did not provide any guidelines in respect of payment of overtime and variation concerning payment of overtime. This is left to the discretion of the person exercising the delegated authority. In item 3 of MBD1 the Minister stated the purpose of the ministerial determination (variations) as being to vary one or more aspects of conditions to accommodate the specific needs and circumstances in the workplace. The Minister was not required to make guidelines on all aspects of section 10. He granted authority for each application to be considered on its own merits and motivation. Accordingly

there was proper delegation. It follows that the second Respondent's decision was lawful.

[14] As it is not the applicant's case that there is no delegation, this ground of review should fail.

[15] The letter of refusal of the variation stated:

> "In terms of the departmental policy, an application is only granted if conditions to the application is (sic) not in the whole less favourable and ---- that the above could not be established."

[16] The applicant has submitted that the policy is *ultra vires* because it makes it impossible for an application to succeed. It was further submitted that there would be no reason for variation if one has to pay extra.

[17] The policy of the Department of Labour as reflected in the letter of refusal appears to be based on section 50(2)A of the Basic Conditions of Employment Act, which provides:

> "A determination in terms of sub-section (1) may only be made in respect of section 9 if -
>
> (a) The employee's ordinary hours of work, rest periods and annual leave are, on the whole, more favourable to the employees than the basic conditions of employment in terms of section 9, 10, 14, 15 and 20.
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> (b) The determination -
>
> (i) has been agreed to in a

collective agreement;

(ii) it is necessitated by the operational circumstances of the sector in respect of which the variation is sought and the majority of the employees in the sector are not members of a registered trade union; or

(iii) applies to the agricultural sector or the private security sector."

[18] The policy referred to by the first and second respondents does not refer to section 50(2)A. There is no basis for the submission that the policy is derived from the provisions of section 50(2)A. In my view the Department of Labour may refer to the provisions of section 50(2)A as guide, in order to give effect to the purpose of the Act.

[19] The Act provides for the basic conditions that must be enjoyed by the employees. It does not provide for the conditions of employment for every employer. It is not the purpose of the Act to take away the rights that the employees enjoy. The policy of the Department of Labour seeks to prevent a situation where the rights enjoyed by the employees are being taken away and ultimately become less favourable to the employees. The conditions need not be better and should not be worse.

[20] The applicant's submissions that it has provided a *quid pro quo* is that it has paid contributions to the provident fund which other companies do not pay. The first and second respondents have countered this by stating that when the number of hours worked per week was reduced from 60 to 55, there was a wage increase which improved the conditions of employees. The working conditions have been improved by the stipulation that the employees work an acceptable number of hours per day. There is merit in this submission and this has not been disputed.

[21] With regard to the contributions to the provident fund, the submission made is that since March 2001 it had become compulsory that employees contribute to the provident fund. That being the case, the contributions made by the applicant are not an additional benefit to the employees entitling the applicant to exemption of paying the statutory amount for overtime worked. The Department correctly refused to accept this

submission.

[22] The proposal of an additional two days' leave being granted as a *quid pro quo* for the reduction in the hourly rate of overtime was rejected by the third respondent. The third respondent felt that it was not just and equitable in relation to the number of hours of overtime worked. This proposal was considered by the second respondent in relation to the objection by the third respondent. The reason given for the decision is rational and the Court cannot interfere with it. The second ground of review should therefore fail.

[23] The third ground submitted for the review is that the first and the second respondents did not properly apply their minds to the information available to them and committed a gross irregularity. The reason for the application for the variation is that the applicant paid its employees less than the amount provided in section 10(2) of the Act for the period between 6 March 2001 to 15 November 2001.

[24] Section 10(2) of the Act provides that the employees must be paid at least 1½ times the employee's wage for overtime worked.

[25] The applicant submitted that it was making in excess of 3% contribution to the provident fund and paid for the lunch hour, thus making up any shortfall in the amount paid to the employees, being a shortfall of 0,025%. It was submitted that the first and the

second respondents ignored the calculation submitted in support of the application.

[26] Mr *Wallis SC*, for the first and second respondents, submitted that clause 5(9) of the sectoral determination and section 10 of the Basic Conditions of Employment Act do not provide for the contributions to the provident fund being paid in lieu of the overtime rate of pay of 1,5. The sectoral determination provides for the number of hours to be worked by the employees per day and per week, as well as the rate of payment for ordinary and overtime hours. It was submitted that the calculations were aimed at proving the impossible and were not material in the outcome of the application. The payment for the meal time was in existence at the time the sectoral determination was introduced. The applicant was also making the contributions to the provident fund. The applicant seeks to have the existing benefits considered in the exemption for the payment of the statutory overtime rate.

[27] There is merit in the respondents' submission that one cannot take away the existing rights in order to comply with the sectoral determination. The difficulty with the respondents' submission is that it has not disputed that the calculations were not taken into account. The submissions made is that these calculations were irrelevant to the outcome of the application.

[28] I disagree with this submission. It was irregular for the

first and second respondents to ignore material submitted for consideration. What the first and second respondents should have done was to consider the information and reject it on the merits. To simply ignore the relevant information submitted for consideration was a gross irregularity. The material, if properly considered, could have provided a basis for a favourable outcome. In the light of the fact that the relevant information was ignored, I find that the third ground for the review should succeed as the first and second respondents committed an irregularity.

[29] On the question of costs, I have decided that each party should pay its own costs. The reason for this is that the respondents were successful in opposing two grounds of review. The review only succeeded on the third ground. The opposition was therefore valid. I have also considered that the issue argued by the parties was a novel one.

[30] The following order is accordingly made:

(a) The decision made by the second respondent to refuse the application for a variation of clause 5(9) of the sectoral determination No 3 applicable to the security industry in terms of section 50(1) of the Basic Conditions of Employment Act 1997 be and is hereby reviewed and set aside.

(b) The application for the variation is referred back to the first and second respondents for proper determination.

(c) The service of the application to further

respondents is condoned.

(d) Each party is to pay its own costs.

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Ngcamu AJ