



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO. CA76/2022

In the matter between:

KSD EMPLOYEES – TRAFFIC OFFICERS

APPELLANTS

and

KING SABATA DALINDYEBO

LOCAL MUNICIPALITY (KSD)

RESPONDENT

JUDGMENT ON APPEAL

Rugunanan J

[1] In the Court a quo the appellants, as applicants, whose collective designation is indicated in the heading to this judgment were met with an order per Dawood J dismissing their application with each party to pay their own costs.

[2] The appellants are a group of 12 individuals all of whom are employees of the respondent and who are identified by their names that appear in an annexure to the founding affidavit.

[3] The main deponent to the founding affidavit is Ms Vuyelwa Makhaya.

[4] Each of the remaining individuals have deposed to confirmatory affidavits and support the averments in the founding affidavit and the relief sought.

[5] Stripped of its incoherence and wordiness the notice of motion identifies the following relief:¹

- (a) An order declaring as unlawful the respondent's reduction of the prescribed rate of their remuneration of 1.5% to 0.5% for Sunday and public holiday work for the period March 2009 to June 2016 (paragraph 1 of the notice of motion);
- (b) An order directing the respondent to calculate and pay at the prescribed rate of 1.5% the amount due to each of them for the aforesaid period (paragraph 2 of the notice of motion).

¹ The original wording of the notice of motion reads (all sic):

- 1) That the respondent's unilateral reduction of the prescribed rate of 1 and half percent (1.5%) to zero point five (0.5%) for Sunday and Public Holiday work during the period spanning from March 2009 to June 2016 be and is hereby declared unlawful.
- 2) That the respondent is directed to forthwith work out the amount due to each employee, account to and pay employees in terms of the prescribed rate of one and a half percent (1.5%) for Sunday and Public Holiday work during the period spanning from March 2009 to June 2016.
- 3) That the respondents failure to furnish applicant with written information relating to the amount not paid and purpose of reduction of the prescribed rate for Sunday and Public Holiday work and consequent deduction of applicants remuneration for period spanning from March 2009 to June 2016 be and is hereby declared unlawful.
- 4) That the respondent be and is hereby directed to furnish employees with written information relating to amount not paid, hours worked and reduction of the prescribed rate for Sunday and public Holiday work and consequent deductions of applicants remuneration for period spanning from March 2009 to June 2016.
- 5) That the respondent is ordered to pay cost of the application.
- 6) Further and/or alternative relief.

[6] Furthermore, as regards what the notice of motion refers to as ‘the amount not paid’, additional relief is sought for orders:

- (a) Declaring as unlawful the respondent’s failure to furnish information relating to the ‘purpose of [the] reduction of the prescribed rate’ for Sunday and public holiday work for the applicable period (paragraph 3 of the notice of motion); and
- (b) Directing the respondent to furnish information relating to ‘hours worked’ and ‘reduction of the prescribed rate’ for Sunday and public holiday work for the applicable period (paragraph 4 of the notice of motion).

[7] Whether the rate of 1.5% per hour applies to the calculation of remuneration for Sundays and public holidays lies at the heart of the dispute between the parties.

[8] As for that rate, the appellants contentions are twofold:

- (a) The entitlement to a remuneration allowance at the specified rate for Sunday and public holiday work stems from the employment contract each of them holds with the respondent; and
- (b) Their employment contracts provide that the prescribed percentage rate is determined by the respondent’s Council.

[9] According to the appellants the prescribed rate is 1.5 times the hourly wage as specified in the respondent’s Policy Manual. This averment is made without attaching proof of the Policy Manual or putting up detail in relation to the date of its issue. Instead, an extract of the Policy Manual is attached to the appellants’ heads of argument. Central to the nature of motion proceedings is that the evidence is placed before the court in the form of affidavits containing factual

allegations made under oath. Heads of argument do not constitute evidence given under oath.² They are merely persuasive comment by the parties or their legal representatives with regard to questions of fact or law and offer no substitute for affidavits.

[10] The appellants in any event assert that they have a contractual right to seek enforcement of Sunday and public holiday work allowances (the allowances) at the rate of 1.5% as determined by the respondent's Council, which rate they contend is specified in the respondent's Policy Manual.

[11] Springing forth from the foregoing are two issues arising from the record:

- (a) Whether the appellants have an enforceable contractual right; and
- (b) The percentage rate applicable to the calculation of the allowances.

[12] Both issues are dependent upon proof by the appellants of their employment contracts. And since these issues go to the gist of the matter and are dispositive of the appeal, it is unnecessary to traverse the various points *in limine* that found favour with the court a quo in dismissing the application. We are in any event of the view that the judgment of the court a quo is correct in its findings.

[13] Although the appellants contested the findings of the court a quo, this had no effect on the substantial issues flowing fairly from the record and that were identified by this Court for determination.³

² *Maboho T and Others v Minister of Home Affairs* para 13 <http://www.saflii.org/za/cases/ZALMPHC/2011/4.pdf> (accessed 10 September 2023)

³ This is in keeping with the approach adopted in *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) para 7, wherein Harms JA remarked: 'The court is entitled to base its judgment and to make findings in relation to any matter flowing fairly from the record, the judgment, the heads of argument or the oral argument itself. If the parties have to be forewarned of each and every finding, the court will not be able to function.'

[14] It is to those issues to which focus is shifted in what follows hereafter.

Proof of employment contracts

[15] Attached to the founding affidavit is a letter of appointment in respect of the deponent Ms Makhaya. She avers that the letter constitutes the employment contract which she holds with the respondent.

[16] Significantly, the letter of appointment is attached piecemeal.

[17] Ms Makhaya asserts that each of the other appellants are uniformly holders of letters of appointment in substantially similar terms albeit with different commencement dates. In support of the averments in the founding affidavit each of the remaining appellants have deposed to confirmatory affidavits without having attached their individual letters of appointment.

[18] It is stated in the founding affidavit that:

- ‘8. It is important to read the provisions of clause 15 in tandem with clause[s] 5 and 6 [of the] other appointment letters to ascertain the context and meaning of the allowances referred to in clause 15.’

[19] Without appending the relevant portions of the employment contract, alternatively the complete contract, the clauses to which the deponent refers in the founding affidavit are obviously lacking an identifiable setting for ascertaining their context in accordance with the settled approach to interpretation enjoined by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁴.

[20] In its answering affidavit the respondent pertinently raised the point that the appellants have failed to attach the contract on which they rely. The defect

⁴ 2012 (4) SA 593 (SCA) para 18.

was manifest in the papers before the court a quo. It was also raised as an issue in the respondent's heads of argument on appeal. The defect pervaded each of the copies of the record provided to this Court and was extant at the time of the hearing of the appeal.

[21] Despite the obvious failing, the record includes a certificate of correctness by the appellants' attorney in which he certifies that the record consists of one volume and contains all that is required for the hearing of the appeal.

[22] The tardy attempt made from the bar to invite the Court to accept the employment contract to cure the record of its deficiency was resisted with an objection by the respondent. The issue was properly and timeously raised in the respondent's answering papers and was inexplicably ignored. For reasons to follow the overall lack of merit in the appeal itself disinclined the Court to accede to the invitation by the appellants' legal representative.

[23] It follows that the appellants have not proven the contractual provisions upon which they seek reliance.

The percentage rate applicable to the calculation of the allowances

[24] Absent proof of the contract, there is a dispute of fact regarding the percentage rate for calculating the allowances. This poses a fundamental limitation for the appellants' case.

[25] Quoting the deponent, their case in the founding affidavit is that:

- '9. The Policy Manual of the Municipality prescribes the rate contemplated in clause 15 of the appointment letter. Clause 5.20 of the Policy Manual deals with pay work on Sunday[s] and public holidays. The following is specifically provided in clause 5.20.1: "An employee whose ordinary shift falls on a Sunday or public holiday shall be paid at one and a half (1.5) times his/her hourly wage for the number of hours so worked. I

conclude by saying that clause 5.20 of the Policy Manual gives effect to Clause 15 of the appointment letter.

10. Antecedent to the transgressions made by the Municipality to the sanctity of the aforesaid contractual arrangement, I wish to make this pertinent submission: All the employees in the Traffic Section received their allowances in terms of the rate and formula prescribed above and that was even showed in their respective payslips. It is my submission that at a certain point the Municipality adhered to and complied with the above contractual arrangement.'

[26] The deponent then proceeds to say:

- '11. During March 2009 the Municipality unilaterally reduced the rate prescribed in Clause 5.20 of the Policy Manual to 0.5. I reiterate that the prescribed rate is 1.5 as adumbrated above.'

[27] In answer, short on simplicity, the municipal manager Mr Ngamela Pakade states on behalf of the respondent (all sic):

- '27. On 11 October 2004, the respondent issued a memorandum detailing how the payment for allowances for working Sundays, public holidays and night shift were calculated ... the said memorandum is attached . . .
28. The rationale in crafting the memorandum was to rectify erroneous payments wherein the employees were overpaid by adding one and a half times the employees wage for each hour worked on Sunday, when that Sunday had already been included at a normal rate. In short the employee would not be paid for working on Sunday at two and a half rate for each hour worked, as was the case before this rectification and also after this method was reversed. This erroneous payment continues as at the time of deposing to this affidavit. Steps to correct same are underway.
29. I therefore contend that the applicants have been overpaid during all other times material other than the period ranging between March 2009 and June 2016 because a wrong formula was used in paying them over and above the normal rate of 1.0 already calculated, a rate of one and a half times the employee's wage for each hour worked on Sundays.'

[28] In addressing the period March 2009 and June 2016 the answering affidavit indicates that:

‘32. On or about the month of July 2016, the applicants were paid at two and a half rate for work on Sundays and on public holidays. This state of affairs is still applicable to date [and] I hasten to add that the respondent continues to be impoverished and suffer losses as a result ...’

[29] Further on Mr Pakade proceeds to say (all sic):

‘34.4 I deny that the respondent reduced the rate of pay from 1.5% to 0.5%. On the contrary the respondent made an adjustment to pay the applicants up to one and a half rate for each hour worked on Sundays by adding the half hour rate (0.5%) to the already included normal rate of 1.0%. Without such adjustment, the applicants were unduly overpaid two and a half times (2.5%) for each hour worked on Sundays. Essentially the applicants are overpaid by 1.0% for each Sunday worked . . .’

[30] Elsewhere he tellingly avers that:

‘35.1 The applicants have failed to attach the contractual agreement they want to rely on.’

[31] In reply it is asserted for the appellants that they are contractually entitled to payment at the rate of 1.5% per hour, this in keeping with the contents of a letter dated 16 March 2016 from the Independent Municipal and Allied Trade Union (IMATU) to the respondent’s director of corporate services. The IMATU letter makes no reference to the contractual provisions relied upon by the appellants, nor to any provisions at all.

[32] It is trite that a party seeking final relief on motion must, in the event of a conflict of facts, accept the version put up by the respondent unless the latter’s allegations are not such as to raise a genuine or *bona fide* dispute of fact or are so

farfetched or clearly unsustainable that the court may justifiably reject them merely on the papers.⁵

[33] On the version presented by the respondent the appellants have not established a contractual entitlement to payment at the rate of 1.5% per hour for allowances nor has there been a reduction in the rate from 1.5% to 0.5%.

[34] Put simply, there is unmistakably a dispute of fact.

[35] For that reason, the respondent's version prevails and is dispositive of the relief claimed in paragraphs 1 and 2 of the notice of motion.

The Basic Conditions of Employment Act 75 of 1997 (the Act)

[36] To support the relief claimed in paragraphs 3 and 4 of the notice of motion the appellants placed store on the statutory obligation of an employer to give an employee written information about remuneration as provided for in section 33 of the Act.⁶

⁵ *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) para 12 citing *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C and *Ripoll-Dausa v Middleton NO & Others* 2005 (3) SA 141 (C) at 151A-153C.

⁶ The section reads as follows:

- '33. Information about remuneration
- (1) An employer must give an employee the following information in writing on each day the employee is paid:
 - (a) the employer's name and address;
 - (b) the employee's name and occupation;
 - (c) the period for which the payment is made;
 - (d) the employee's remuneration in money;
 - (e) the amount and purpose of any deduction made from the remuneration;
 - (f) the actual amount paid to the employee; and
 - (g) if relevant to the calculation of that employee's remuneration –
 - (i) the employee's rate of remuneration and overtime rate;
 - (ii) the number of ordinary and overtime hours worked by the employee during the period for which the payment is made;
 - (iii) the number of hours worked by the employee on a Sunday or public holiday during that period; and
 - (iv) if an agreement to average working time has been concluded in terms of section 12, the total number of ordinary and overtime hours worked by the employee in the period of averaging.
 - (2) The written information required in terms of subsection (1) must be given to each employee –
 - (a) at the workplace or at a place agreed to by the employee; and

[37] It is understood that in respect of the period March 2009 to June 2016 paragraphs 3 and 4 of the notice of motion contemplate relief: (a) declaring unlawful the respondent's failure to furnish the appellants with information relating to the purpose of the reduction of the prescribed rate; and (b) directing the respondent to furnish information relating to reduction of the prescribed rate and the hours worked at the reduced rate.

[38] In effect, what the appellants are seeking is information relating to the reduction of the prescribed rate.

[39] The respondent presented a version demonstrating that there has never been a reduction of the prescribed rate.

[40] No case has been made out by the appellants that even with a finding to the contrary they be provided with information of the rate contended for on the respondent's version.

[41] Where the appellants have fallen short of proving the relief they claim, accordingly the Act does not come to their assistance.

[42] In heads of argument the respondent labelled the appeal an abuse of process and sought a dismissal with a special order for costs on the attorney and client scale. The appellants made no counter argument on the costs issue and persisted with their contention that the appeal had merit and that they be awarded costs. On the merits, the appellants were obviously mistaken. While the appeal constitutes an abuse of process, we are of the view that costs should not be awarded to the

(b) during the employee's ordinary working hours or within 15 minutes of the commencement or conclusion of those hours.'

respondent on the scale contended for and that the usual order should be made attendant on the outcome of the matter.

[43] In the result the appeal is dismissed with costs.

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

I agree.

L. RUSI
JUDGE OF THE HIGH COURT

I agree.

D. O. POTGIETER
JUDGE OF THE HIGH COURT

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14 August 2023

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31 October 2023