IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
Held in Johannesburg

Case no: JA49/08

In the matter between

Mondi Packaging (Pty) Ltd	**Appellant**
and	
Director-General: Labour	**1st Respondent**
Department of Labour: Provincial Office Gauteng South	**2nd Respondent**
Kenny Fick, N.O	**3rd Respondent**
Inspector M G Ramushu, N.O	**4th Respondent**
Zephania D Khambule	**5th Respondent**
Solomon Mutungwa	**6th Respondent**

JUDGMENT

ZONDO JP

Introduction

[1] This is an appeal against a judgment and order of the Labour Court given by Molahlehi J in terms of which he dismissed with costs an appeal noted by the present appellant to the Labour Court in terms of sec 72(1) of the Basic Conditions of Employment Act, 1998. ("**the BCEA**"). The background to the appeal is set out below.

Background

[2] Sec 16(1) of the BCEA reads as follows:

> **"16 PAY FOR WORK ON SUNDAYS – (1) An employer must pay an employee who works on a Sunday double the employee's wage for each hour worked, unless the employee ordinarily works on a Sunday, in which case the employer must pay the employee one and one-half times the employee's wage for each hour worked."**

The effect of sec 16(1) is that it creates two categories of employees. The one category is a category of employees who ordinarily do not work on Sundays. It confers upon employees who fall into this category the right to be paid at double their normal hourly rate should they work on a Sunday. The other category of employees for which the section caters is the that of employees who ordinarily work on Sundays. It confers upon the employees who fall into this category the right to be paid at the rate of one and one-half times their hourly rate for every hour worked.

[3] Sec 6(3) of the BCEA empowers the Minister of Labour to issue a determination excluding certain categories of employees from the

operation of Chapter 2 or any provision of Chapter 2 of the BCEA. Sec 6(3) reads as follows:

> **"The Minister must, on the advice of the Commission, make a determination that excludes the application of this Chapter or any provision of it to any category of employees earning in excess of an amount stated in that determination."**

The effect of sec 6(3) of the BCEA is that the Minister of Labour is given the power to make a determination the effect of which is to make chapter 2 or any provision thereof not applicable to certain categories of employees. Sec 16 falls within chapter 2 of the BCEA.

[4] Sec 63(1) (a) of the BCEA confers upon the Minister of Labour the power to appoint any person in the public service as a labour inspector. In sec 64(1) it is provided that the functions of an inspector include investigating complaints made to him or her about non-compliance with any employment law and endeavouring to ensure compliance with an employment law by securing undertakings from the employer or employers concerned and by issuing compliance orders. Sec 69 gives a labour inspector, who has reasonable grounds to believe that an employer has not complied with a provision of the BCEA, the power to issue a compliance order against such employer.

[5] Once a labour inspector has issued a compliance order against an employer, the employer is required to comply with the compliance order, unless it objects to the compliance order as provided for in sec 71 of the BCEA. If the employer wishes to object to a

compliance order in terms of sec 71, it must do so to the Director-General of the Department of Labour within a prescribed period from the receipt of the compliance order. The Director-General then considers the representations made by the objecting employer and any other relevant information. He "**may confirm modify or cancel an order or any part of an order**." If the order is not cancelled, the employer must thereafter comply with the order or with that part of the order that has been confirmed.

[6] If the employer still feels aggrieved after the Director-General has dealt with its objection or with its representations in regard to its objection to the compliance order in terms of sec 71, the employer has a right of appeal to the Labour Court in terms of sec 72 against the order of the Director-General. That right of appeal must be exercised within 21 days of receipt by the employer of the order of the Director-General. The operation of the Director-General's order is suspended pending the appeal to the Labour Court. There is no provision in the BCEA that deals in express terms with the nature of the appeal to the Labour Court provided for in sec 72 nor is there a provision which specifies what powers the Labour Court has in dealing with appeals from orders of the Director-General.

[7] The fifth and sixth respondents' contracts of employment contained the following provision on overtime in clause 7:

"7. OVERTIME

7.1 The Employee specifically agrees to work overtime as and when required to do so by the Employer. Failure to work such overtime shall constitute a material breach of this contract.

7.2 **Overtime wages will be calculated and paid according to the relevant company policy."**

The significance of clause 7.1 of the fifth and sixth respondents' contracts of employment is that, although the fifth and sixth respondents were obliged to work overtime, there was no agreement between the parties on the frequency and amount of overtime that would be worked per week or per month or per year. The consequence hereof is that nobody could tell in advance how much overtime the fifth and sixth respondents would have worked by year end and, therefore, how much overtime pay would have been added to their normal earnings. There was uncertainty in the agreement on this issue.

[8] In this case the fifth and sixth respondents were at all material times employed by the appellant as supervisors. It is common cause that the fifth and sixth respondents did not ordinarily work on Sundays but did work on Sundays from time to time. It is common cause that the appellant did not pay the fifth and sixth respondents at the rate of one and one – half their wages for every hour worked on Sunday as prescribed by sec 16(1).

[9] On the 14th March 2003 the Minister of Labour published a determination made in terms of sec 6(3) of the BCEA in which he determined that all employees earning in excess of R115 572,00

per annum were excluded from the operation of, among others, sec 16 of the BCEA. By that determination the Minister excluded from the operation of sec 16 "**all employees earning in excess of R115 572, 00 per annum"**. The determination read as follows:

> **"I, Membathisi Mphumzi Shephered Mdladlana, Minister of Labour, in terms of Section 6(3) of the Basic Conditions of Employment Act, No 75 of 1997 (the Act), determine all employees earning in excess of R115 572, 00 per annum be excluded from sections 9, 10, 11, 12, 13, 14, 15, 16 and 18(3) of the Act and fix the second Monday after the date of publication of this notice as the date from which the said determination shall be binding.**
>
> **For the purposes of this notice:**
> **Earnings means gross pay before deductions, i.e. income tax, pension, medical and similar payments but excluding similar payments (contributions) made by the employer in respect of the employee."**

[10] The fifth and sixth respondents complained to the Department of Labour that the appellant was not paying them at the rate of one and one-half times their wages for each hour worked on Sundays during certain periods which they specified. The Department of Labour initiated an investigation of the fifth and sixth respondents' complaints. The appellant's answer to the complaints was that it was not obliged to pay the 5th and 6th respondents at the rate of one and one half of their hourly wages when they worked on Sundays, as required by sec 16(1) of the BCEA, because sec 16 did not apply to the fifth and sixth respondents. The appellants stated that the

fifth and sixth respondents' earnings for the year in question exceeded or had exceeded the threshold specified in the Ministerial determination and that, for this reason, sec 16 was of no application to the two respondents. In calculating the 5th and 6th respondents' annual earnings for the year in question the appellant included overtime pay which it had paid to the two employees whereas the 5th and 6th respondents did not include overtime pay in their calculations.

[11] After investigation the Department concluded that the fifth and sixth respondents' complaints were valid. The department excluded overtime pay in calculating the fifth and sixth respondents' annual earnings. In other words, the department rejected the appellant's contention that, in calculating the fifth and sixth respondents' gross pay, overtime pay should be included. In due course a compliance order was issued against the appellant. The appellant lodged an objection to the compliance order with the Director-General and made written representations to persuade the Director-General to "**cancel**" the compliance order. The Director-General confirmed the order. The appellant then lodged an appeal to the Labour Court.

Appeal to the Labour Court

[12] In the Labour Court the matter came before Molahlehi J. The appellant's defence was the same defence which has been set out above. In the Labour Court the issue was whether or not overtime pay should be included in calculating the annual earnings of the fifth and sixth respondents. The appellant contended that it should be included whereas the Director-General and the fifth and sixth respondents contended that overtime pay should be excluded.

[13] The Labour Court considered the appeal and concluded that in the calculation of the fifth and sixth respondents' annual earnings for purposes of the Ministerial determination, overtime pay should be excluded. It, accordingly, upheld the compliance order issued by the Department of Labour and effectively confirmed by the Director-General. It handed down a judgment in terms of which the appellant's contention was rejected and the appellant's appeal was dismissed with costs.

[14] The thrust of Molahlehi J's reasoning was that the construction of "**gross pay**" contended for by the appellant led to unfair, unjust and unreasonable consequences which could not have been intended by the Minister when he issued the Ministerial determination. In par 28 of his judgment Molahlehi J said:

> [28] **"An interpretation that includes in it overtime in the calculation of the annual earnings carries with it uncertainty and imposes a burden of unfairness on the employee. Uncertainty on the part of employees arises in relation to compliance or non-compliance and on the part of an employee uncertainty arises from the fact that overtime being an ad hoc event largely determined by the employer, would never be able to tell whether he or she falls within the threshold at any given time**."

[15] The appellant continued to feel aggrieved after the decision of the Labour Court and applied to the Labour Court for leave to appeal to this Court against the judgment and order of the Labour Court. That application was dismissed. Thereafter the appellant petitioned

the Judge President for leave to appeal and this Court granted leave to appeal.

The appeal to this Court

[16] In this Court the appellant advanced the same argument as described above in support of its contention that the fifth and sixth respondents' annual earnings took them outside of sec 16(1) of the BCEA by virtue of the Ministerial determination. The respondents also advanced the same arguments as those described above in support of their contention that sec 16(1) applied to the fifth and sixth respondents.

[17] As already stated above, in the Ministerial determination the word "**earnings**" is defined as "**gross pay before deductions, i.e income tax, pension, medical and similar payments but excluding similar payments (contributions) made by the employer in respect of the employee"**. The effect of the determination was that employees whose "**gross pay**", as defined in the determination, was in excess of R115 572,00 per annum were excluded from the operation of, among others, sec 16.

[18] It is common cause between the parties that during the relevant period the fifth and sixth respondents had been paid overtime pay and that, if such overtime pay was included in the calculation of their earnings for the period in issue, they earned more than R115 572, 00 and, therefore, would be excluded from the operation of sec 16 if overtime was to be included in the calculation of the annual gross pay of the fifth and sixth respondents.

[19] In this case Counsel for the appellant submitted that the Ministerial determination must be interpreted on the basis that its words be given their "**ordinary, literal, grammatical**" meanings unless there is ambiguity. In this regard he was referring to the words "**gross pay**". His submission was that the ordinary, literal and grammatical meaning of the term "**gross pay**" includes overtime pay. He submitted that, once it was accepted that overtime pay earned during the relevant year fell within the term "**gross pay**," the conclusion that the fifth and sixth respondents had been excluded from the benefits or protection of sec 16 of the BCEA would be inevitable.

[20] Counsel for the appellant relied upon inter alia what was said by Smalberger JA, writing for the majority, in **Public Carriers and others v Toll Road Concessionaries (Pty) Limited and others 1990 (1) SA 925 (A) at 942I- 943C,** namely,**:**

> **"The primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature. It is now well established that one seeks to achieve this, in the first instance, by giving the words of the enactment under consideration their ordinary grammatical meaning, unless to do so would lead to an absurdity so glaring that the Legislature could not have contemplated it … Subject to this proviso, no problem would normally arise where the words in question are only susceptible to one meaning: effect must be given to such meaning. In the present instance the words 'an alternative road' are not linguistically limited to a single ordinary grammatical meaning. They are, in their context, on a**

> **literal interpretation, capable of bearing the different meanings ascribed to them by the applicants, on the one hand, and the respondents, on the other. Both interpretations being linguistically feasible, the question is how to resolve the resultant ambiguity. As there would not seem to be any presumptions or other recognised aids to interpretation which can assist to resolve the ambiguity, it is in my view appropriate to have regard to the purpose of s 9(3) in order to determine the Legislature's intention."**

A little later Smalberger JA said at 943H and 943J-944A, respectively,:

> **"Mindful of the fact that the primary aim of the statutory interpretation is to arrive at the intention of the Legislature, the purpose of a statutory provision can provide a reliable pointer to such intention where there is ambiguity. …**
>
> **… it must be accepted that the literal interpretation principle is firmly entrenched in our law and I do not seek to challenge it. But where its application results in ambiguity and one seeks to determine which one of more than one meaning was intended by Legislature, one may in my view properly have regard to the purpose of the provision under consideration to achieve such objective."**

On behalf of the respondents it was submitted that, if the appellants' contention that overtime pay was included in the term "**gross pay**" within the context of this case was accepted, this would result in injustice, unfairness and absurdity. It was submitted

on the respondents' behalf that the meaning that should be given to the term "**gross pay**" should exclude overtime pay. The respondents' submission was that the gross pay to which the Ministerial determination refers means gross pay earned by the employee in respect of his or her ordinary hours of work. In support of this contention the respondents inter alia referred to sec 35 of the BCEA which will be quoted in due course.

Does "gross pay" in the Ministerial determination include overtime pay?

[21] In the Ministerial determination the Minister of Labour excluded from the operation of among others sec 16 of the BCEA **"all employees earning in excess of R115 572, 00 per annum".** He went on to define **"earnings"** as meaning, for purposes of the determination**, "gross pay before deductions, i.e. income tax, pension, medical and similar payments (contributions) made by the employer in respect of the employee."**

[22] Like the Labour Relations Act, 1995 (Act 66 of 1995) ("**the LRA**"), the BCEA must be interpreted purposively. Its purpose is set out in sec 2 as being "**to advance economic development and social justice by fulfilling the primary objects of this Act which are –**

(a) to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution-

(i) by establishing and enforcing basic conditions of employment; and

(ii) by regulating the variation of basic conditions of employment;

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation."

Since the Ministerial determination under consideration is subordinate legislation made under the BCEA, it, too, must be interpreted purposively.

[23] I have previously expressed the view that under purposive construction or interpretation it is not necessary that there be ambiguity in the meaning of a statutory provision which is sought to be interpreted before one can have regard to the purpose of such statutory provision or the purpose of the Act of Parliament of which the provision is part. See **Equity Aviation Services (Pty) Ltd v SATAWU & others (2009) 30 ILJ 1997 (LAC) at par 63 at 2021**. The statement that one must have regard to the purpose of a statutory provision sought to be interpreted only if there is ambiguity forms part of the literal theory of interpretation and is not a necessary element of purposive interpretation. Under purposive interpretation, legislation must be interpreted in the light of its purpose or objects at all times. In my view this approach to interpretation is consistent with the statements made by the Constitutional Court, through Ngcobo J, as he then was, in **Chirwa v Transnet Ltd & others 2008 (4) SA 367 (CC) par 110.** There the Constitutional Court, in the context of sec 3 of the LRA, said in part:-

> "**The objects of the LRA are not just textual aids to be employed where the language is ambiguous. This is apparent from the interpretive injunction in s 3 of the LRA which requires anyone applying the LRA to give effect to its primary objects and the Constitution. The**

> **primary objects of the LRA must inform the interpretive process and the provisions of the LRA must be read in the light of its objects."**

[24] In the first two sentences of paragraph 110 *in Chirwa* the Constitutional Court effectively said that the provision of sec 3 of the LRA means that the objects of the LRA are not textual aids to be employed only where the language is ambiguous. After pointing out in **NEHAWU v UCT (2003) 24 ILJ 95 (CC) at par 41** that sec 3 of the LRA:

> "**lays down the parameters of [the LRA's] interpretation by enjoining those responsible for its application to interpret it in compliance with the Constitution and South Africa's international obligations**",

the Constitutional Court, through Ngcobo J, held that "**the LRA must therefore be purposively construed in order to give effect to the Constitution**."

[25] Although the BCEA does not have a provision such as s 3 of the LRA, two of its primary objects, which it shares with the LRA, are **"to give effect to and regulate the right to fair labour practices conferred by s 23(1) of the Constitution"** and to give effect **"to obligations incurred by the Republic as a member state of the International Labour Organisation."** (Sec 2 of the BCEA). It seems to me that certain statements made by the Constitutional Court in par 110 in Chirwa and par 41 in NEHAWU v UCT, set out above, mean that, under purposive interpretation, regard to the objects of a statute or a statutory provision, when seeking to interpret it, is not to be had only when there is ambiguity in the

provision. The statements are those in which the Constitutional Court said:

(a) the objects of the LRA are not just textual aids to be employed only where the language of the provision is ambiguous (par 110 Chirwa);

(b) the objects of the LRA must inform the interpretive process (par 110 Chirwa);

(c) the provisions of the LRA must be interpreted in the light if its objects (par 110 Chirwa);

(d) The LRA must be purposively construed in effect because sec 3 thereof enjoins that it be interpreted in compliance with the Constitution and South Africa's international obligations (par 41 NEHAWU v UCT).

[26] In this matter the difficulty I have with the proposition that **"gross pay"** as used in the Ministerial determination includes overtime pay is that, since both the employer and the employee would never know in advance how much overtime the employee would work in a given year, nobody would know in advance whether or not, if the employee worked on a particular Sunday, he would be entitled to be paid at the rate prescribed by sec 16. Put differently, no one would know whether, if an employee worked on a particular Sunday, the employer would be obliged to pay him at the rate prescribed by sec 16 or not. Let me illustrate this by way of an example. An employee, Mr A, is employed with effect from 2

January in a particular year. In terms of his contract of employment he does not normally work on Sundays. Let us assume that, if he will have worked all his ordinary hours of work from January to the end of December of that year without overtime, his annual wage will be R80 000,00 which is below the Ministerial threshold. If he were to only work some overtime, he may or may not earn over R115 572, 00 per annum, depending on how much overtime he will have worked and how much overtime pay he would have been paid over the period. If the employer asked the employee to work on the first or second or third Sunday in January, neither the employer nor the employee would know at that stage what the employee's exact gross pay will be at the end of the year because nobody will know whether or not such overtime as he will have worked by the end of the year will place his gross pay over the threshold of R115 572, 00. The result of this is that, if the employer asked whether in law it would be obliged to pay the employee at the rate prescribed by sec 16 of the BCEA, if he asked Mr A to work on a certain Sunday, no one would be able to tell him because the answer would depend on how much overtime the employee will have worked by the end of the year and, therefore, how much overtime he will have worked and, therefore, how much overtime pay Mr A would have earned by the end of the year.

[27] On the meaning of "**gross pay**" that includes overtime pay, it will not be possible to say in advance whether or not the employee is entitled to the pay rate prescribed by sec 16(1) when he is asked to work on a Sunday. What will happen is that on the Sunday in question in January or indeed even in any other month when the employee works on Sunday for the first time in the year, the

employer cannot be said to be obliged to pay the employee at the rate prescribed by sec 16 but he may at the end of the year be said to have been obliged to do so after the annual overtime pay has been calculated and added up to the employee's annual gross pay in respect of ordinary time and, it is found that the employee worked so much overtime that his annual gross pay went over the R115 572, 00 threshold. This is a completely untenable proposition concerning the meaning to be given to **"gross pay"** in the Ministerial determination**.** It brings about uncertainty and, quite frankly, leads to an absurdity. On this construction, there would be legislation which makes it impossible, until after the event, to tell those who are subject to it in advance when their conduct is permitted and when it is not permitted.

[28] When Counsel for the appellant was confronted with the difficulties set out above which would arise if the meaning for "**gross pay**" in the Ministerial determination for which he contended was accepted, he submitted that it was the employee's annual earnings or annual gross pay of the preceding year that should be relied upon to determine whether in a particular year the employee's earnings were above or below the prescribed threshold. The submission has no merit nor has it any legal basis.

[29] If one took **"gross pay"** in the Ministerial determination to mean gross pay in respect of ordinary working time and, therefore, excluding overtime, the difficulty illustrated above in respect of the appellant's contention does not arise. If one attaches this meaning to "**gross pay**" in the Ministerial determination, one can at any given time of the year tell what the employee's gross pay per

annum is because that can be gathered from the contract of employment of the employee and having regard to what the employee will have earned by the end of the year in respect of his ordinary hours of work. Both the employer and the employee can tell at any one time the employee's annual gross pay and, therefore, whether the employee is or is not covered by s 16 of the BCEA because one can calculate the number of ordinary hours the employee will work over a year. Both the employer and the employee will, therefore, know whether or not, if the employee works on a Sunday, he would be entitled to be paid at the rate prescribed by sec 16 of the BCEA. In my view this is the meaning that must be given to the term **"gross pay"** in the Ministerial determination.

[30] There is statutory support for the view that the words "gross pay" in the Ministerial determination mean gross pay in respect of ordinary hours of work and exclude overtime pay. Sec 16 uses the word **"wage"** to refer to the pay that must be made to an employee who works on a Sunday. Sec 1 of the BCEA defines the word **"wage"** as meaning:

> **"the amount of money paid or payable to an employee <u>in respect of ordinary hours of work</u> or, if they are shorter, <u>the hours an employee ordinarily works in a day or week.</u>"** (my underlining).

The use in sec 16 of the word **"wage"** and its definition in sec 1 with reference to ordinary hours of work supports the proposition that the term "**gross pay**" in the Ministerial determination means a "**gross wage**" or "**gross pay**" in respect of ordinary hours of work and does not include pay in respect of overtime. After all the

Ministerial determination seeks to take a certain category of employees out of the ambit of sec 16 which uses the term "**wage**" to specify the pay rate at which employees who work on Sundays should be paid. Furthermore, sec 35(1) of the BECA provides that **"(a) n employee's wage is calculated by reference to the number of hours the employee ordinarily works."** (My underlining).

[31] Sec 32(1) (b) of the BCEA obliges the appellant as an employer to pay to an employee any remuneration that is paid in money "**daily, weekly, fortnightly or monthly**". Sec 32 (3) (a) obliges the appellant as an employer to pay the employee's remuneration not later than seven days after the completion of the period for which the remuneration is payable. Such period must in terms of sec 32 (1) (b) be either daily, weekly, fortnightly or monthly. It cannot be more than monthly. The appellant's contention on the meaning of the term "**gross pay**" in the Ministerial determination means that, if the fifth and sixth respondents worked on a particular Sunday, the appellant would be unable to comply with the requirement that it must pay them within seven days of the completion of the work because, until the end of the year or until such time as the fifth and sixth respondents have worked a certain amount of overtime in a year, the appellant would not know whether their overtime pay placed them above the threshold prescribed in the Ministerial determination and, therefore, would not know whether or not sec 16 of the BCEA applied to them. Accordingly, the appellant's contention on the meaning of "gross pay" in the Ministerial determination will result in the appellant being in breach of s 32(1) (b) of the BCEA whenever the fifth and sixth respondents have

worked on a Sunday. A construction of a statutory provision which results in the breach of another statutory provision should not be adopted if there is another construction which is justifiable and which does not produce such a result.

[32] In conclusion I am of the view that the term "**gross pay**" in the Ministerial determination means gross wage or gross pay in respect of ordinary hours of work and, therefore, excludes overtime. In these circumstances I conclude that Molahlehi J was right in reaching the conclusion that he did. In the light of the above the appeal falls to be dismissed. With regard to costs I think that the requirements of law and fairness dictate that the appellant should pay the respondents' costs.

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

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ZONDO JP

I agree.

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DAVIS JA

I agree.

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JAPPIE JA

Appearance

For the appellant	:	Mr A Redding SC
Instructed by	:	Deneys Reitz
For the respondent	:	Adv P Mokoena
Instructed by	:	State Attorney
Date of Judgment	:	23 July 2010