

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE No: J 1523/05

IN THE MATTER BETWEEN:

MONDI PACKAGING (PTY) LTD

APPELLANT

AND

DEPARTMENT OF LABOUR

FIRST RESPONDENT

KENNY FICK NO

SECOND RESPONDENT

INSPECTOR RAMUSHU

THIRD RESPONDENT

ZEPHANIA KHAMBULE

FOURTH RESPONDENT

SOLOMON N MUTUNGWA

FIFTH RESPONDENT

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JUDGMENT

MOLAHLEHI A.J

Introduction

1] The appellant appeals against the confirmation of the compliance order issued by the fourth respondent under reference number PD 758-759RA in terms of Section 69 of the Basic condition of Employment Act 75 of 1997(the Act). In terms of the compliance

order which was issued on the 12 August 2004, the appellant was ordered to make payment in the amount of R6999-00 to the fifth respondent and an amount of R7 648 -00 to the sixth respondent.

Background

- 2] Mr Khambule and Mr Mutungwa, who I will in this judgment interchangeably refer to as “*the employees*” or use their names depending on the context, lodged a complaint with the first respondent (the DoL) alleging that the appellant was refusing to pay them for overtime worked on Sundays.
- 3] They indicated that the appellant was refusing to pay for the overtime because they were earning above the threshold of R115 780.00 as determined by the Minister of Labour in terms of section 6 the Act. They pointed out in their complaint that the reason why they were earning above the threshold was because the appellant included over time in its calculation of their earnings. Khumbule’s complaint relates to the period 13 April 2003 to 28 December 2003 and that of Mr Matungwa’s relates to the period from 30 March 2003 to 4 January 2004.
- 4] It would seem that after conducting his investigation, the third respondent, Mr Ramushu (the inspector) made following recommendation:

“I hereby recommend the consideration of the compliance order because the employer is including the Medical Aid Top Up as part of the salary and that the employer’s argument is based in the IRP5 which covers the whole financial payments whereas most of the months the salary was below the threshold.”

5] Subsequently, and on 23 February 2004, the inspector issued the appellant with a compliance order to pay the employees the over time they were claiming.

6] The appellant filed an objection in terms of Section 71(1) of the Act, based on the contention that the employees were earning above the threshold as determined by the Minister of Labour in terms of the Determination: Earnings Threshold (the threshold) promulgated in terms of section 6(3) of the Act. The objection was accompanied by both the IRP5 form for the previous year, being 1 March 2003 to 29 February 2004, including their pay slips for the same period. In its objection the appellant argued that the IRP5 forms of the employees reflected that their remuneration for the financial year exceeded the threshold.

7] In his report the inspector accepted that the determination does not exclude over time payment which if included in the earnings would cause the employees to exceed the threshold. He however reasoned that remuneration in terms of the letters of appointment were below the threshold and in this regard said:

“Their remuneration in terms of the letters of appointment is below the threshold. The occasional rise in remuneration is due to the number of overtime worked that particular month. The allowance which top up the basic salary being Medical Aid, Shift Allowance and Incentive bonuses all together does not exceed the threshold where overtime was no worked. It has also been discovered that the occasional rise of their salaries is due to the Standby allowance Agreement that the company has entered into with the majority Union Ceppawu , that allows the company to call employees on standby with a certain extra remuneration even during their off-days.”

The grounds for appeal

8] The appellant appealed on the ground that the second and the third respondents erred by:

“1.1 By finding that the Fifth-and Sixth Respondents are entitled to pay for work on Sundays in terms of Section 16 (1) of the Basic Conditions of Employment Act, ‘in circumstances where the Fifth and Sixth Respondents ‘earnings (as defined in Government gazette 25012 of 14 March 2003) are in excess of the threshold determined by the Minister in terms of Section 6(3) of the Basic Condition of Employment Act.”

9] The appellant argued that in the threshold the Minister clearly eschewed the calculations of times which are applicable elsewhere in other sections of the Act. The apparent reason for this according to the appellant is that calculating the threshold over a month rather than a year could lead to anomalous and entirely inaccurate results. This could on the basis of this argument mean that there may be periods during the year when an employee could be below or over the threshold, depending on the variables included in the monthly salary.

10] In relation to the “*Gross pay before deductions*,” the appellant argued that it means all monies due to an employee by virtue of his employment, inclusive of overtime, allowances and other payments.

11] The appellant further argued that the inspector should have included in his calculations the medical top up because it was an amount intended to compensate an employee for the medical aid reduction from 80% to 67%. The appellant also pointed out that the gross pay of the employees would still be above the threshold even if the medical top up was to be deducted from the gross pay.

The legal interpretation

12] The critical question in this appeal is whether on a proper construction of the Determination: Earnings Threshold, overtime should be included in the gross pay of employees for the purposes of determining whether they fall within the threshold of R115780.00.

13] Section 16 of the Act, requires an employer to pay an employee who works on Sunday double that employee's wage for each hour worked unless the employee's ordinarily works on a Sunday. In the case of an employee who works ordinarily on a Sunday, the employer is required to pay such an employee at one and one-half times for each hour worked.

14] Section 16(3) requires the Minister to issue a determination on the advice of the Employment Condition Commission that excludes employees who earn above the threshold from the application of a number of sections in Chapter 2 including section 16 of the Act. This means that an employer would not be obliged to pay an employee who earns in excess of the threshold for working on a Sunday.

15] The Minister issued his determination on the 14 March 2003, through government notice 356, and determined the threshold to be R115, 572.00 per annum. The determination defined word “earnings” to mean:

“Earnings means gross pay before deductions, i.e. income tax, pension, medical and similar payments but excluding similar payments (contribution) made by the employer in respect of the employee.”

16] Section 35 which the inspector relied on in his calculation to determine whether the employees earn in excess of the threshold provides:

“(1) An employee’s wages is calculated by reference to the number of hours the employees ordinarily works.

(2) *For the purposes of calculating the wage of an employee by time, an employee is*

deemed ordinarily to work-

(a) *45 hours in a week, unless the employee works a lesser number of hours a week;*

(b) *nine hours in a day, or seven and a half hours in the case of an employee who works for more than five days a week, or the number of hours that an employee works in a day in terms of an agreement concluded in accordance with section 11, unless the employee ordinarily works a lesser number of hours in a day.”*

17] It is apparent that the appellant adopted a literal interpretation of notice 356 based on an annual calculation of the total earnings of an employee. In terms of this interpretation, gross earnings include payment of overtime. This argument is attractive but unsustainable in that it does not take into account the context and the purpose of the legislation.

18] The applicant's argument in a sense is based on the economic rational in the calculation of earnings. This argument overlooks the social imperatives that underpin the Act and the determinations made pursuant thereto. The underlying rational for payment of overtime in particular for work done on Sunday, is not confined to compensating for the contractual obligation between the parties but includes more importantly the social aspect of being away from family and the health consequences associated with working long hours without rest.

19] The established general principles of statutory interpretation were considered in *Birch v Klein Karoo Agricultural Co-operative Limited* 1993 (3) SA 403 (A) at 411E-H wherein the court said:

“It is a well established principle of construction that in constructing a statutory provision the object should be to ascertain from the language used the interpretation which the legislature meant to express. In ascertaining this intention, regard is to be had both to the language of the enactment and to the context, using this word in a wide sense.”

20] The general principle, which is often referred to in cases dealing with interpretation, is that the words and expressions used in a statute must be interpreted according to their ordinary meaning. The meaning of this principle was interpreted by Schreiner JA, in *Jaga v Donges, N.O. and another, Bhana v Donges N.O. and another 1950 (4) SA 653 (A.D) at 662G*, to mean that words and impression in a statute “*must be interpreted in the light of their context.*”

21] In the application of this principle Schreiner JA at 662G-663A, stressed two points which he stated as follows:

“The first is that “the context”, as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind of the part to the interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the enquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together.”

22] In *Metthews v Pretorius* 1984 (3) SA 547 (T), the court held that modification of the language of the statute was desirable in the light of a contextual interpretation and necessary to prevent the purpose of the statute being frustrated and to ensure equitable result.

23] In *Rossouw v Sachs* 1964 2 SA 551 [A.D.] at 564-A Ogilvie Thompson AJ said:

“...it should determine the meaning of a section upon an examination of its wording in the light of the circumstances where under it was enacted and of its general policy and object.”

24] The same approach was followed in the case of *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape 2001 3 SA 582 (SCA)*, where in dealing with the issue of interpretation of the statute and quoting from *Bhyat v Commissioner for Immigration 1932 AD 125*, the Court said:

“The cardinal rule of construction of statutes is to endeavor to arrive at the intention of the lawgiver from the language employed in the enactment In construing a provision of an Act of Parliament the plain meaning must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied that the legislature could not have intended”

25] In locating the present case within the context and the purpose of the Act the only conclusion that can be arrived at is that the Minister could not have intended to include in the calculation of gross earnings, the overtime pay. The purpose of the Act is set out in section 1 of the Act as follows:

“The purpose of this Act is 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.”

26] The contextual interpretation would also be in line with the international labour standards. The Universal Declaration of Human Rights, states that in general that every person has *“the right to rest and leisure,”* and the Covenant on Economic, Social and Cultural Rights also refers to rest and leisure. See also the Protocol of San Salvador article 7 (b) which provide for a *“reasonable limitation of working hours, both daily and weekly.”*

27] The European Social Charter requires the contracting parties *“to ensure a weekly rest period which shall, as far as possible, coincide with the day recognized by tradition or custom in the country or region concerned as a day of rest.”*

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 employers 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.

29] The correct interpretation is that which carries with it the beneficial social consequences and assumes that the Minister in the determination could not have intended unfair, unjust or unreasonable result or consequences.

30] In my view the inspector's interpretation is the correct one in that it seeks to ensure that not only the objective of the Act is achieved but also fairness prevail in the application of the provisions of the determination. It is also an interpretation that reconciles the provisions of the threshold with the enabling Act.

31] In the circumstances the appeal is dismissed with cost.

MOLAHLEHI AJ

DATE OF HEARING : 30 MARCH 2007

DATE OF THE ORDER: 21 SEPTEMBER 2007

Date of the typed Judgment:

APPEARANCES

FOR THE APPLICANT: ADV A I S REDDING SC

INSTRUCTED BY : DENEYZ REITZ

FOR THE RESPONDENT: ADV P MOKOENA

INSTRUCTED BY : STATE ATTORNEY