

SOUTH AFRICA / JUDGMENT

**New Way Motor & Diesel Engineering
(Pty) Ltd v Marsland (JA 15/2007) [2009]
ZALAC 27; (2009) 30 ILJ 2875 (LAC); [2009]
12 BLLR 1181 (LAC) (13 August 2009)
[2009] ZALAC 27**

COURT

Labour Appeal Court

BEFORE

Zondo JP, Davis JA, Jappie JA

CASE / FILE NUMBER

JA 15/2007

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IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in Johannesburg

Case no: JA 15/2007

In the matter between

NEW WAY MOTOR & DIESEL

ENGINEERING (PTY) LTD Appellant

And

CLAYTON MARSLAND Respondent

JUDGMENT

ZONDO JP

- [1] I have had the benefit of reading the judgment prepared by Davis JA in this matter. Except on the issue of the claim for overtime pay, I agree with Davis JA's judgment that the appeal falls to be dismissed. I also agree with the reasons he provides in his judgment for that conclusion. I am unable to agree with him that the Court a quo was correct in its conclusion that the respondent was entitled to payment of the overtime pay that he claimed. In my view the respondent failed to prove that he was entitled to payment of the overtime pay that he claimed and the Court a quo ought not to have awarded him such overtime pay. The reasons for my conclusion in this regard appear below.

[2] The appellant's claim for overtime pay was based on clause 12.2 of his contract of employment which governed the working of overtime and payment thereof. Clause 12.2 reads as follows:

" 12.2 Overtime

Overtime is a condition of employment and you are expected to work the statutory prescribed maximum overtime, currently 3 hours per day and ten hours per week, provided that:

The EMPLOYER notifies the EMPLOYEE during the preceding day that he/she is required to work overtime; and

Nothing in this agreement shall limit the EMPLOYER'S right and your obligation to work emergency overtime on short notice.

Overtime payment will be made in terms of the applicable conditions of employment at a rate of one and a half times ordinary wage, on the normal pay day."

As the respondent's claim for overtime pay was based on clause 12.2 of his contract of employment, to succeed in his claim, the respondent was required to bring his claim for overtime pay within the ambit of clause 12.2. If he failed to bring his claim

within the ambit of clause 12.2, his claim fell to be dismissed.

[3] At a general level clause 12.2 makes the working of overtime conditional upon the employer notifying "the employee during the preceding day that he/she is required to work overtime." It also makes provision for a situation where the employer's notice that the employee is required to work overtime can be shorter than the one that must be given during the preceding day. In my view clause 12.2 does not envisage the working of overtime other than overtime which is worked pursuant to notification by the appellant to an employee of the need for that employee to work overtime. Obviously, this does not mean that an employee cannot work overtime unless the employer has first given the employee notice of the need for him to work overtime in terms of clause 12.2. Of course an employee can work overtime whenever he

wants to and without the employer having first given him or her the notice contemplated in clause 12.2 but in such a case the employee is not entitled to payment of overtime pay. In other words, if an employee is not going to want to be paid for overtime work and he feels that he needs to work overtime, he may work overtime without first being given notice of the need for him to work overtime by the appellant. What clause 12.2 seeks to do is to ensure that the appellant will not attract liability for the payment of overtime pay unless the working of overtime which gives rise to that liability was worked at the employer's instance. Clause 12.2 seeks to protect the appellant against claims for the payment of overtime pay for overtime that was not worked at its instance. In other words an employee who wants to increase his income during a particular month cannot just decide to work overtime without the prior approval of the appellant and thereafter present the appellant with a claim for overtime payment. Where an employee fails to

show that the working of overtime was at the instance of the employer, he must fail in his claim.

- [4] In this case the appellant disputed the respondent's claim to payment of overtime pay. In his statement of claim the respondent did not even allege that the overtime for which he sought payment had been worked at the instance of the appellant nor did he claim that he had been notified by the appellant of the need to work overtime. In par 4.15 of the pre-trial minute one of the "facts" listed as being in dispute between the parties was the question of whether or not the appellant owed the respondent overtime pay. In par 5.2 of the pre-trial minute the parties identified the issue of whether the amount of R96 378, 75 less tax, which was the amount claimed by the respondent as overtime pay, was due by the appellant to the respondent.
- [5] In this matter the respondent failed to show that the appellant had approved the working of overtime concerned or that he worked overtime after he had been given notice to do so by the appellant. In his evidence-in-chief the respondent did not cover this requirement at all notwithstanding the fact that he read clause 12.2 of the employment contract into the record. During the respondent's cross-examination Counsel for the appellant who appeared in the Court below, Mr N. Cassim SC, made it quite clear that he was going to argue at the end of the trial that the respondent was not entitled to payment of overtime pay because he had not been instructed to work overtime.
- [7] As I have already indicated earlier, Mr Cassim was correct in the suggestion referred to above in that in the respondent's evidence-in-chief the respondent did not lead evidence to the effect that he had been instructed to work the overtime for which he was claiming payment. It was only in re-examination that the respondent's attorney in the Court below sought to lead evidence by the respondent on whether he had been instructed to work overtime. The respondent's attorney asked the respondent a very direct question on this, namely, whether or not, when he and other employees worked overtime, they had been instructed to work overtime "or did you just work it when...[indistinct]?" The respondent's answer to this question by his attorney was interesting in some respect. His reply was:

"...Mr Patterson, the nature of the work, if I had to travel to an exhibition and you had to set up the exhibition and you had to man it until 22:00 at night, it was automatic that you do it, if you were not going to do it who was going to do it sir?"

As it can be seen, that answer by the respondent was not an answer to the effect that an instruction for the working of that overtime had been given.

- [8] Seeing that the answer given by the respondent was not to the effect that an instruction had been given, the respondent's attorney made another attempt to deal with the defect in the respondent's evidence and the following exchange ensued between the respondent's attorney and the respondent:

Mr Patterson: "Was your employer aware that you were working overtime?"

Mr Marsland: "Aware, he knew exactly what it was. He had attended enough of the expos. He knew exactly sir"

Mr Patterson: "Would it come to your employer [as a] surprise that you were working overtime?"

Mr Marsland: "Absolutely not, sir."

The answers which the respondent gave to these questions in re- examination did not bring his claim for overtime pay within the ambit of clause 12.2 because they were not to the effect that the appellant had instructed or requested the respondent to work the

overtime for which he was claiming payment nor are they to the effect that the working of such overtime by the respondent was preceded by a notice such as is contemplated by clause 12.2 of the employment contract. It was not good enough for the respondent to say that the appellant was aware that he was working overtime. The working of overtime should have been initiated by the employer. I can ask my secretary to work overtime and in such a case she must be paid for the overtime. Equally my secretary can realise that over the past few days she has not been productive and she is behind with her work and can decide on her own to work overtime. That is a case where I do not become aware of this at the time, however, even where, as I leave Chambers to go home at the end of the day, I see my secretary still working and it is way after her normal knock-off time, she is still not entitled to payment for working overtime. In the latter case I would be aware that she is working overtime but that would not necessarily entitle her to payment for overtime work because it was her own decision to work overtime and I did not authorise it or I did not ask her to work overtime. By the same reasoning it cannot help the respondent to say that the appellant was aware that he was working overtime in a situation where he claims payment for overtime under clause 12.2. He is only entitled to the payment of overtime

pay if the notice that in terms of clause 12.2 must be given to him before he works overtime for which he must be paid has been given by the employer to him.

[9] What makes matters worse for the respondent is that he had various versions on his claim for payment for overtime work. In the Court below Mr Cassim referred to such versions in the respondent's evidence. Davis JA deals with the issue of the claim for overtime in paras 27-33 of his judgment. On my reading of Davis JA's judgment in regard to the overtime pay issue, it

seems that no finding is made that the respondent was instructed to work overtime but the overtime pay claim is upheld because it seems to have been undisputed that the respondent did work the overtime. In my view the issue that needs to be decided is whether, assuming that the respondent did work the overtime he claimed to have worked, he did so on the appellant's instruction or on his own. Put differently, the question is whether the employer had given the respondent the notice to work overtime required by clause 12.2. In my view, most, if not all, of the findings made in paragraphs 28, 30 and 31 of Davis JA's judgment support the upholding of the appellant's appeal in respect of the overtime claim and not the dismissal of the appeal. In my view in the light of those findings the conclusion should be that the appellant's appeal against the

order of the Court a quo in regard to the overtime claim should succeed.

In the result I would uphold the appeal in part and dismiss it in part. Except for par 2.4 of the order proposed by Davis JA which I do not support, I support the orders he proposes at the end of his judgment.

Zondo JP

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Case No.: JA 15/2007

NEW WAY MOTOR & DIESEL

ENGINEERING (PTY) LTD Appellant

and

CLAYTON MARSLAND Respondent

DAVIS JA:

Introduction

- [1] This is an appeal against a judgment of Stein AJ, which was delivered on 26 September 2007. In her judgment, Stein AJ held that respondent had been subject to an automatically unfair dismissal, whether in terms of section 187 (1)
- (d) or (f) of the Labour Relations Act 66 of 1995 ('the Act'). Stein AJ ordered appellant to pay the respondent 24 months remuneration, calculated at the respondent's rate of remuneration on the date of dismissal, a further amount of R18720.00 in leave pay and an amount of R77658.75 in overtime pay, together with costs.

- [2] With the leave of this court, appellant has appealed against the judgment on the following grounds:

1. There was no automatically unfair dismissal;
2. In terms of the decision in *Wardlaw v Supreme Mouldings* (2007)

28 ILJ 1042 (LAC), the Labour Court had no jurisdiction to hear the dispute;

The decision to grant overtime pay was incorrect and should have been set aside and;

The award of compensation as granted was incorrectly granted.

Factual background

- [3] Respondent commenced employment with appellant on 1 February 2001 as the organization's marketing manager. Appellant, which is in essence a family business, rebuilds diesel motors and supplies diesel generators and power products to different markets including the hospitality, manufacturing, information technology, and health and construction industries. As part of his appointment, respondent headed the marketing department and was responsible for 8 employees of appellant who worked in the marketing department. It appears that one of his major tasks was to raise the profile of appellant and to increase exposure of its products, both locally and in Africa.
- [4] Respondent was also responsible for the organization and coordination of appellant's attendance at various exhibitions and business expos at which the products of appellant could be marketed. He was also responsible for improving appellant's relationship with the Department of Trade and Industry through their trade missions in Africa. As a senior member of the management team, he was required to attend regular management sales production meetings together with his senior colleagues.
- [5] In December 2001 while on leave, respondent had a nervous breakdown. It appears from the evidence that the breakdown was caused by his wife who unexpectedly left him after 24 years of marriage during the family's Christmas holiday in Kwazulu-Natal. This traumatic event triggered off a series of events of which respondent had no personal recollection. Suffice to record that on 28 December 2001, he was found in his motor car by his sister who immediately sought medical attention for him. He was hospitalized until 27 January 2002. During his stay in hospital, he was heavily medicated and advised by his doctors that he had a complete breakdown brought on by anxiety and depression.
- [6] On 01 February 2002 respondent returned to his employment. Before the court a quo he testified that initially his relationship with his fellow employees and the senior management of appellant continued to be relatively

harmonious. However, within a short period upon his return, significant changes began to affect his conditions of employment.

As he described the situation in his testimony, it was as if he had 'a contagious disease'. The managing director of appellant, Mr John Freed, uttered a number of crude remarks concerning respondent's ex-wife, such as 'forget about

the bitch'; 'find yourself a slut and get over it'. He was then denied access to the pricing of new products which rendered it impossible to perform part of designated job description. He was excluded from important decision making processes to which he had been a party prior to December 2001. According to his testimony, this disabled him from performing a managerial function in respect of the marketing of appellant.

- [7] On 24 April 2002, after significant pressure had been exerted upon him by Mr Freed and his wife Ruth Freed, respondent agreed to meet their cousin Jane Couplin. The Freed's obviously considered that this meeting would find him a new companion. Upon his return to the office after meeting Ms Couplin, he was greeted with much mirth and jocularly by a number of his colleagues he felt most uncomfortable.
- [8] In March 2002 he was involved in two serious arguments with Mr Freed over the pricing of orders. He was again verbally abused by Freed in the most derogatory of terms, called to the board room and yet again threatened by Freed. Pursuant thereto, his involvement in two exhibitions, the 'Nampo and Royal shows' was summarily terminated without any explanation.
- [9] In May 2002 he suffered a relapse into a state of depression. He was instructed by the psychiatrist Dr Craig Bracken, treating his depression not to return to work until the commencement of the following week. A note generated by Dr Bracken was given by respondent to Mr Pedro Pinho, the financial director of appellant who reacted: 'this will not carry on'. Upon his return, to work Freed enquired as to why he had not been to work for a week. Respondent then informed him of his condition. Freed replied 'ja well you must get yourself together'. Later on that same day, 13 May 2002, he was handed a notice to attend a disciplinary enquiry. The charges which were brought against him included poor work performance, poor time keeping, misuse of company benefits and breaching of company rules and regulations. He was then informed by Pinho that he had been suspended and instructed to go home and prepare for the hearing.
- [10] The next day, 14 May 2002, Dr Bracken, dispatched the following letter to appellant:
- "To whom it may concern:*
- Re – Mr Clayton Marsland
- I have seen Mr Marsland since 29/12/2001. He was submitted for severe illness needing impatient treatment. He remains on maintenance medication and at times still has difficulty coping."
- Pursuant thereto, the disciplinary enquiry was postponed until the 16 May 2002. The hearing was then adjourned to 20 May 2002 at which time respondent requested representation which was denied. Mrs Ruth Freed advised respondent that a tape recording may have been made of the disciplinary enquiry held on 16 May 2002 although no copy of such transcript or recording was ever provided to respondent.
- [11] On 22 May 2002, the chair of the disciplinary committee found respondent guilty of three of the four charges and recommended that he be given a final written warning. He was not found guilty of poor work performance. The chair recommended that the respondent be counseled regarding his work performance, to the extent that appellant was dissatisfied therewith. He was instructed to resume his duties on 23 May 2002. Upon his return he was

handed a final written warning for those charges in respect of which he had been found guilty. He now found that his desk was emptied of all his personal belongings which were placed in boxes beside the desk. His computer, which had previously been situated on his desk, had also been relocated. He was advised that he would be relocated to a position directly across that from that of managing director Freed. He was also denied access to his filing

cabinet. His request for access to the filing cabinet was repeatedly refused, including a written request on 03 July 2002.

- [12] Subsequent to his resumption of duties on 23 May 2002, his treatment at the hands of members of appellant steadily worsened. Projects in which he had previously been involved were unilaterally cancelled without consultation, including important exhibitions, the Ghana and DTI Pavilion exhibitions. He was refused permission to deal with price queries from clients in respect of projects with which he had previously been involved. As part of his marketing function, he had been scheduled to attend a United Nations briefing session pertaining to the UN Disaster Relief Management programme. This briefing session was relevant to appellant as it was a potential vendor of equipment for the UN Relief agency in Africa. On 28 May 2002 he was instructed not to so attend. He was also instructed that he could not attend sales and production meetings on the 28 May 2002, as the issues discussed at these meetings would be irrelevant to his position. He had however previously attended all similar meetings.
- [13] On 28 May 2002 he received a memorandum from Mr Freed which removed certain critical functions which had previously been performed by him. He was also informed that all further documentation prepared by him was to be countersigned one of the directors of appellant. Further, he could not enter appellant's fax room for the purpose of removing or transferring faxes.
- [14] On 19 June 2002 respondent had a medical appointment with Dr Bracken between 15h30 and 17h00. He informed a director of appellant that he was required to attend this meeting. The request was denied. On 25 June 2002 he found that his telephone line had been blocked and that he was only able to receive incoming telephone calls. According to his testimony before the court a quo, he was subject to verbal abuse and threats of assault by senior employees of appellant. After the disciplinary enquiry, these threats intensified to include obscene and arbitrary acts of verbal harassment of an extremely degrading nature. He was instructed not to eat lunch during normal lunch hours during which times other members of staff took their lunch breaks.
- [15] On 20 June 2002 he was informed in a letter by the National Employers Forum that on appeal hearing was set down for 28 June
2002. This hearing was finally heard on the 28 June 2002. However, without prior notification he was summonsed on 04 July 2002 to a meeting with the managing director Mr Freed. At that meeting he found two representatives from the National Employer Forum. He was advised

that appellant intended to outsource his marketing function and, as a result thereof, his position would become redundant. During the course of what he described as an acrimonious meeting, his cellular telephone rang. He answered the call which was of a personal nature and informed the caller that he was in a meeting and could not attend to the call and but would deal with it later. At this point, Mr Freed verbally abused him in the presence of the representatives of the National Employers

Forum and began physically to threaten the respondent. As a result, without notice, on the 04 July 2002 respondent terminated his contract of the employment with appellant.

[16] On 10 July 2002 the respondent referred the dispute to the Metal Engineering Industry Bargaining Council. He described his dismissal as one of automatically unfair constructive dismissal, alternatively unfair constructive dismissal. On 24 July 2002 the Commissioner appointed to conciliate issued a certificate stating that the matter had remained unresolved.

[17] Respondent then approached the Labour Court for relief, submitting that he had been automatically unfairly dismissed, alternatively automatically unfairly constructively dismissed in terms of section 186 (e) read with section 187 (1) (d) and/or (f) of the Act. The two reasons set out in the applicant's statement of case were as follows:

"48.1 The applicant was automatically unfairly dismissed in that he was arbitrarily discriminated against for depression after his hospitalization. This was exacerbated subsequent to the Respondent's disciplinary enquiry and the appeal hearing and upon the Applicant attempting to exercise rights in terms of the LRA in respect of the Respondent's unlawful issuing of the final written warning and unprocedural conduct of the disciplinary process;

The applicant's dismissal constituted a constructive

dismissal. The inconsistencies in the Application of company rules, the victimisation and verbal abuse suffered by the Applicant, the threat to the physical integrity, the marginalisation of the Applicant from day to day activities related to functions in respect of which the Applicant was directly responsible and the events on 4 July 2002

made continued employment of the Applicant with the Respondent intolerable."

Judgment of the court a quo

[18] The only evidence which was heard by the court a quo was given by respondent. Neither Mr Freed nor any other representative of appellant testified to gainsay the version of events described by respondent. On the strength of this evidence, Stein AJ found that respondent had been constructively dismissed. She then turned to the question as to whether the respondent had proved an automatically unfair dismissal. For the learned acting judge, the key question was the following:

“Was the applicant’s mental health problems and later the exercising of his rights in terms of the Act the dominant or principle reason that caused the respondent to discriminate against him, such discrimination causing an intolerable working environment such that the applicant was forced to terminate the employment contract?”

She concluded:

“All the evidence suggests that there was a deliberate strategy from this point onward (01 February 2002 when respondent returned to work) on the respondent’s behalf to exclude the applicant from the work that he had previously been involved in. Without explanation or justification his work was reallocated to other employees. The applicant was given menial tasks to do, he was ostracized by Freed and other members of senior management and Freed started to verbally abuse the applicant. In my view, the conduct of the respondent towards the applicant as set out above amounted to unfair discrimination against applicant on the grounds of his mental health.”

Stein AJ went on to hold that discrimination on the grounds of mental health problems constituted an arbitrary ground. Mental health had played a significant role in the dismissal of the respondent and accordingly the dismissal had been shown to be automatically unfair.

The appeal

- [19] In order to assess the nature and scope of the appeal, it is important first to turn to the relevant legislative framework set out in the Act. Section 186 (1) (e) provides that dismissal means that an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.
- [20] Section 187 (1) (d) provides a dismissal is automatically unfair if the employer in dismissing the employee acts contrary to section 5 or if the reason for the dismissal is that the employee took action or indicated an intention to take action against the employer by;
- (i) exercising any right conferred by this Act; or
 - (ii) participating in any proceedings in terms of this Act.

Subsection (1) (f) includes as an automatically unfair dismissal where the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

- [21] Mr Snyman, who appeared on behalf of the appellant, did not dispute that there had been a constructive dismissal of respondent. In short, he accepted that appellant, without reasonable or proper cause, had conducted itself in a manner which was calculated or likely to destroy or seriously damage the relation of confidence and trust between appellant and respondent. See *Pretoria Society for the Care of the Retarded v Loots*

(1997) (18) ILJ 981 (LAC) at 985. Mr Snyman however contended that the dominant or even a significant reason for the dismissal of the employee did not constitute a prohibited ground.

[22] In the heads of argument prepared by the parties, there is a careful analysis of the indicated approach to determine the basis for such a dismissal. For the purposes of this judgment, it is not necessary, however to prefer either of the two approaches set out in *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC) to determine whether respondent was automatically unfairly dismissed. The reason is that, on either of the tests set out in the *Kroukam* judgments, this court must arrive at the same conclusion.

[23] That conclusion is the following: the evidence of respondent constitutes the uncontradicted factual matrix. Mr Freed or any other member of appellant could have testified and placed in issue the employment conditions described by respondent as he had set them out in his evidence. This was never done and therefore the evidence of respondent pertaining to his illness and the actions of appellant's employers and directors remains uncontradicted. The evidence which must thus be accepted is that, prior to December 2001, no problem had been encountered by respondent in his work relationships with any member of appellant, including its managing director Mr Freed. By contrast, shortly after his return to work in February 2002 the entire working relationship

had radically altered and he was subjected to the disgraceful treatment described earlier in this judgment. For this reason,

appellant's contention that respondent was dismissed because, as Mr Snyman put it, 'he was useless in his employment after his illness' is unsupported by any evidence.

[24] It is not strictly necessary to decide whether the concept of 'disability' as set out as a ground in section 187

(1) (f) describes the condition suffered by respondent. The uncontested evidence of the respondent supported by a letter from his psychiatrist does support such a conclusion in that he had suffered from depression. The description of depression is also set out in his statement of case. Depression is a form of mental illness; see *Diagnostic and Statistical Manual of Mental Disorders IV*. But, even were his condition not to be considered a form of disability as set out in section 187 (1) (f), unquestionably the discrimination suffered by respondent as a result of his 'mental health problem' had, in the words of Stein AJ, 'the

potential to impair the fundamental dignity of that person as a human being or to affect him in a comparably serious manner'.

[25] Expressed differently, the question can be posed thus: did the conduct of the appellant impair the dignity of the respondent; that is did the conduct of the appellant objectively analysed on the ground of the characteristics of the respondent, in this case depression, have the potential to impair the fundamental human

dignity of respondent? See for the source of this approach, *Harksen v Lane* NO 1997 (11) BCLR 1489 (CC); *Hoffmann v South African Airways* 2001 (1) SA 1 (CC)

[26] In my view, the question must be answered affirmatively. The conduct of appellant clearly constituted an egregious attack on the dignity of respondent and accordingly falls within the grounds set out in section 187 (1) (f) of the Act.

The issue of compensation

[27] Respondent's claim for compensation was based on a schedule which set out hours of unpaid overtime work which he claimed he had undertaken in March, May, June, July, August, September, November 2001 and March 2002. The total amount was 265.5 hours which equated to an amount of R 77 658.75.

[28] Under cross-examination, respondent proved to be an unsatisfactory witness in his specific testimony about the date the schedule had been produced and shown to Mr Pinho, as he had claimed in examination in chief. This is evident from the following passage of cross examination:

"Now this particular written document (the schedule) that you have now submitted to the court, this document was never submitted to your employer, do you agree? --- It was Sir.

When? --- It was given to Pedro Pinho in early December 2001, because we discussed it and I said to him here is what I am looking for and it was up to the date, to the end of 2001 at that stage.

By why did you not submit it in your ordinary claim form? ---

Because when I discussed it on an ongoing basis he said to me that the overtime was not part of your daily expenses allowance.

But I asked you a few minutes ago, I said did you give any written claim to your employer and you said no. --- Not a written request, I gave him a breakdown of what my claims were.

How did you give him a breakdown in your claim? --- Something similar to this, day and the hours.

Not this one, something ... [intervenes]? --- Not his one something similar.

Where is that one you gave? --- Pedro Pinho must have it.

You know what you have given three versions now. You have said to the court that you never gave a written claim, then I got the impression you say you gave this to Pedro Pinho who you now no longer works for my client and now you are saying you gave him another claim of a similar nature."

Respondent thus conceded that the schedule, which he had claimed had been handed to Pinho in December 2001, could not have been the same as the schedule placed before the court as this schedule contained a claim for overtime in March 2002.

[29] Further, there was a contractual provision which foreshadowed the overtime provisions of the Basic Conditions of the Employment Act 75 of 1977. In terms of the contract, the overtime provisions were set out thus:

“12.2 OVERTIME Overtime is a condition of employment and you are expected

to work the statutory prescribed maximum overtime, currently 3 hours per day and ten hours per week, provided that:

the EMPLOYER notifies the

EMPLOYEE during the proceeding day that he/she is required to work overtime; and

nothing in this Agreement shall

limit the EMPLOYER’S right and your obligation to emergency overtime on short notice.

Overtime payment will be made in

terms of the applicable conditions of employment at a rate of one and a half times ordinary wage, on the normal pay day.”

[30] As Mr Snyman correctly submitted, the evidence of respondent caused a significant doubt as to veracity of the overtime schedule relied upon by the court a quo to quantify the overtime claim. Furthermore, that overtime schedule reflected an amount of overtime vastly in excess of the maximum set out in the contract. Furthermore, there was no evidence provided to the effect that the appellant required the overtime to be worked as set out in the schedule or that it had so authorised this amount of overtime. In addition, no claim for overtime had been made in any of the letters of demand generated by respondent’s attorney nor under cross-examination was respondent able to explain this omission by his attorney. Accordingly, no explanation was proffered as to why no overtime had been claimed during the pre-litigation phase of the dispute.

[31] In these circumstances and in the absence of clear proof, the court is unable, in my view, to rely upon the schedule which was generated by respondent. But it was common cause that respondent worked overtime. Appellants argument was solely about the requisite authorization of overtime; that is was the overtime beyond the contractual limitations of overtime authorized. However, it was clear from evidence which remained uncontradicted, that overtime work had been performed by respondent.

[32] In the light of the often contradictory and certainly unsatisfactory evidence of respondent, but absent any other evidence, the court is required to undertake its own calculation which, in the circumstances, is fair to respondent who clearly, on the uncontested evidence, worked overtime but, which claim in the absence of any other evidence, must fall within the parameters of the contract. To ignore that respondent worked this uncontested amount of overtime and thus not order the requisite compensation, on the facts, would be grossly

unfair to respondent. Accordingly, employing the provisions of clause 12 of the contract which provides for permissible overtime, the following calculation is adopted to make the necessary award:

In the week 5 – 10 May 2001, the respondent, on his version, worked 37 hours overtime. He was contractually limited to 10 hours. 27 hours must be deducted;

In the week 13 – 18 May 2001, the respondent, on his version, worked 36 hours overtime. He was contractually limited to 10 hours. 26 hours must be deducted;

In the week 15 – 21 June 2001, the respondent, on his version, worked 30 hours overtime. He was contractually limited to 10 hours. 20 hours must be deducted;

In the week 27 June – 3 July 2001, the respondent, on his version, worked 30 hours overtime. He was contractually limited to 10 hours. 20 hours must be deducted;

In the week 4 July – 10 July 2001, the respondent, on his version, worked 29 hours overtime. He was contractually limited to 10 hours. 19 hours must be deducted;

In the week 3 – 9 September 2001, the respondent, on his version, worked 37 hours overtime. He was contractually limited to 10 hours. 27 hours must be deducted;

In the week 3 – 9 March 2002, the respondent, on his version, worked 34 hours overtime. He was contractually limited to 10 hours. 24 hours must be deducted;

Thus, from a total of 265.5 hours, 163 hours must be deducted, leaving 102.5 hours of overtime for which respondent must be paid.

[33] Having calculated the hours of overtime at 102.5, there was no reason to suggest that the hourly rate for overtime should not be R292.50. Accordingly, the overtime that should have been awarded amounts to R30 142. 50.

Compensation

[34] Mr Snyman submitted that the award of 24 months compensation was unreasonable in the circumstances in that the appellant had offered to restore the employment relationship which offer had been declined. Further, the issue of possible alternative employment of the respondent had not been canvassed by the court a quo. I find these arguments unconvincing. Respondent had returned to work in a vulnerable condition and had been subjected to a brutal regime of insult, psychological assault and egregious treatment for a significant period of time. The court a quo was correct to conclude that:

“The appalling way in which the respondent treated Marsland which did not cease at the time of his dismissal but included the respondent’s vindictiveness to Marsland after his dismissal with regard to his UIF card, his pension fund payout and return of personal belongings which were only returned to him on the day of the trial. This is a case in which it is appropriate that the respondent be ordered to pay maximum compensation of 24 months.”

[35] This court must set itself against cruel, inhuman and arbitrary treatment of employees in the fashion exemplified by the disgraceful behavior of appellant and its senior management. There is no basis with which to interfere with the award of maximum compensation.

[36] In the result the following order is made.

1. The appeal is dismissed with costs;
2. The order of the court a quo is set aside and replaced with the following order:

It is declared that the dismissal of the applicant was automatically unfair in terms of section 187 (1)

(f) of the Labour Relations Act 66 of 1995;

The respondent is ordered to pay the applicant 24 months remuneration calculated at applicant's rate of remuneration on the date of dismissal;

The respondent is to pay the applicant the amount of R 18 720. 00 in leave pay;

The respondent is to pay the applicant in the amount of R 30 142. 50 in overtime pay;

Respondent is to pay the applicant's cost of this action.

DAVIS JA

I agree

JAPPIE JA

APPEARANCES

For the appellant : Mr S Snyman

Instructed by : Snyman Attorneys

For the respondent : Mr B Patterson

Instructed by : Deneys Reitz Inc

Date of hearing : 12 March 2009

Date of judgment : 13 August 2009

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