

SOUTH AFRICA / JUDGMENT

Solidarity obo Members v Eskom Holdings (JS795/2022) [2024]

ZALCJHB 356 (5 September 2024)

[2024] ZALCJHB 356

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

JS795/2022

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JS 795 / 2022

In the matter between:

SOLIDARITY
obo MEMBERS
Applicant
and
ESKOM
HOLDINGS SOC LTD
Respondent

Heard:

15 August 2024

Delivered:

5 September 2024

This

judgment was handed down electronically by consent of the parties' representatives by circulation to them via email.

The date for

hand-down is deemed to be 5 September 2024.

JUDGMENT**PRINSLOO J****Background and evidence adduced**

- [1] It is common cause that the Applicant (Solidarity) acts on behalf of four of its members (the employees), all employed by the Respondent (also employer or Eskom) as permanent managerial employees, working shifts at the national control and system operating control.
- [2] The employment conditions for managerial-level employees are negotiated annually and include inter alia excess hours, leave, transfer benefits and shift cycles. Prior to 2016, the employees were paid at a double rate for excess hours worked and Eskom wanted to change the rate to a single rate for excess hours. The employees did not agree to the proposed change of their conditions of employment and Solidarity, on behalf of the employees, referred a dispute to the CCMA under case number GAJB 22574-15.
- [3] On 11 April 2016, the Applicant on behalf of the employees, represented by Mr Wedderspoon, and the Respondent, represented by Mr Makuyana, senior manager: rewards and benefits, concluded a settlement agreement in relation to the remuneration of managerial employees pertaining to excess hours worked. The relevant terms of the settlement agreement were:

‘1. The dispute under CCMA case reference number GAJB 22574-15 is settled on the following basis:

1.1 The Respondent agrees that this Agreement shall be applicable to managerial employees working shifts at national control and system operating control (system operator).

1.2 Applicants shall be paid for excess hours at a double rate phased out over a period of 12 (twelve) months, commencing with effect from 1 April 2016 and ending on 31 May 2017.

1.3 With effect from 1 April 2017, Applicants will be paid at a rate of 1:75 per month for excess hours worked.

1.4 The aforementioned rates are based on each individual’s actual rate of pay (pensionable earnings).

1.5 All monies due to the Applicants shall be paid one month in retrospect in the Respondent’s pay roll run (example: Excess hours worked in the month of April will be paid at the end of May).

1.6 All outstanding monies due to the Applicants for excess hours worked shall be paid in the April 2016 pay run.

2. This settlement agreement is entered into by the parties in full and final settlement of the dispute and any claims of whatsoever nature that the Applicants may have or have had against the Respondent relating to the payment of excess hours worked.

3. This settlement agreement is entered into by the parties without any admission of liability and is concluded in order to finalize this longstanding dispute before the CCMA.
 4. For the purposes of this settlement the Applicants, who have been represented by the trade union, have mandated the representatives to sign the settlement agreement on their behalf. The Applicants consider same legally binding upon them.
 5. The CCMA will record that this dispute has now been resolved and finalised in accordance with the terms of this agreement.'
- [4] It is evident from the settlement agreement that the double rate for excess hours was to be phased out over a period of 12 months, with effect from 1 April 2016 and that from 1 April 2017, the employees would be paid at a rate of 1,75 for excess hours worked. Eskom paid the employees the 1,75 rate from 1 April 2017 until 1 February 2022.
- [5] On 31 January 2022, Mr Makuyana sent correspondence to the employees with the heading 'Improvements and changes to the employment conditions for managerial levels (ECML) effective from 1 October 2021'. The letter recorded that the employment conditions for managerial level employees are normally reviewed with effect from 1 October annually, but for 2021, the implementation date was moved to 1 February 2022. The employees were informed that only where there is a legal requirement for managerial employees to work shifts, the excess hours would be paid at 1,5 times the hourly rate of pay and that overtime worked on a public holiday,
- would also be paid at 1,5 times the hourly rate of pay for actual hours worked.
- [6] From 1 February 2022, the employees were paid 1,5 times their hourly rate of pay for excess hours worked.
- [7] On 25 February 2022, the Applicant addressed a letter of demand to Eskom, insisting on compliance with the settlement agreement reached under case number GAJB 22574-15, in terms of which the employees are to be paid a rate of 1,75 for excess hours worked. It was recorded that Eskom's changes to the overtime rate payable to the employees constituted a breach of the settlement agreement and it was demanded that the employees' conditions of service be restored immediately, in accordance with the terms of the settlement agreement.
- [8] Eskom responded by acknowledging that a settlement agreement was entered into, which led to the resolution of the dispute that was declared, but such an agreement was not an indefinite one. Eskom consulted with managerial employees and after the consultation process was exhausted, Eskom implemented the revised excess hours rate. The revised rate was 1,5 times the hourly rate of pay for actual hours worked.

- [9] In March 2022, the Applicant referred a dispute regarding the breach of a collective agreement to the CCMA. The Applicant's case was that Eskom acted in breach of a settlement agreement/collective agreement that was reached regarding the overtime rates payable to the employees by not adhering to the agreement. The Applicant required Eskom to honour the settlement agreement and to pay the employees the rate agreed to.
- [10] In November 2022, the Applicant filed a statement of claim in terms of the provisions of Rule 6 of the Rules of the Labour Court[1].
- [11] The Applicant's pleaded case is that Eskom did not consult or negotiate with them about amending the terms and conditions as set out in the settlement agreement and they never agreed to the amendment of the terms thereof. The terms of the settlement agreement formed part of the terms of their contracts of employment and the Respondent's non-compliance with the terms of the settlement agreement constitutes a breach of contract. The employees' claim is one of a breach of contract and they seek

specific performance.

- [12] The Respondent's pleaded case is that the settlement agreement of 11 April 2016 was entered into in order to settle a long-standing dispute before the CCMA. The issue relating to managers' payment of excess hours worked has always been part of the basket of issues that the parties annually consult on. The rate for payment of overtime was part of the issues that came up for consultation in the 2021 financial year and after the parties could not reach agreement, Eskom implemented what it regarded as a fair rate.
- [13] The rate of payment for excess hours worked is determined by the outcome of consultation between the parties. Eskom pleaded that this is evident from the fact that the rate was initially double but after consultation, it was changed to 1,75 in 2016.
- [14] In short, the Respondent's case is that the rate as contained in the settlement agreement of April 2016 is not cast in stone and unchangeable, it does not form part of immutable terms and conditions of employment but is subject to the outcome of consultation. The settlement agreement ran its course, and the implementation of a new rate does not constitute a breach of contract.
- [15] The Applicant called two witnesses. Mr Wedderspoon, a union official, testified that he signed the settlement agreement in April 2016 on behalf of Solidarity and the intention was to settle the dispute in full and final terms. There was no discussion or agreement about the duration of the settlement agreement and according to Mr Wedderspoon, the agreement could not come to an end unless Eskom terminated overtime work or renegotiated new terms.

- [16] In cross-examination, Mr Wedderspoon agreed that the rate of overtime pay was an issue the parties negotiated about and that it was not cast in stone. He conceded that the settlement agreement settled the dispute under case number GAJB22574-15 and that no other dispute was settled.
- [17] Mr Wedderspoon further conceded that there was a consultation process in 2021 about the conditions of employment, that the parties could not agree on the overtime rate and that the employer implemented the rate of 1,5. He also conceded that after Eskom communicated in January 2022 that an overtime rate of 1,5 would be implemented, Solidarity disputed the implementation thereof and demanded that the rate of 1,75 be paid to the employees and that this constitutes an interest dispute and not a rights dispute.
- [18] Mr Fourie, one of the applicant employees, testified that a settlement was reached at the CCMA in 2016 and that the settlement agreement then concluded, was legal and binding and it can only be amended once all the parties agree to an amendment. His understanding is that the settlement agreement was ongoing until overtime was cancelled or until the parties negotiated another agreement on which they all agreed.
- [19] Mr Fourie testified that there was no consultation on the new 1,5 rate of overtime, but only information sharing and they did not agree to the 1,5 rate and that they would never agree to that.
- [20] In cross-examination, Mr Fourie conceded that the rate of overtime was indeed an issue that was open for negotiation, but he insisted that as long as the parties cannot reach an agreement on the overtime rate, the 2016 settlement agreement would prevail. He agreed that in 2016, Eskom wanted to implement a lower rate of overtime but the employees did not agree and they referred a dispute to the CCMA, where an agreement was reached to pay a rate of 1,75. Eskom subsequently implemented a rate of 1,5 but no dispute was referred to the CCMA as the employees are of the view that the settlement agreement is still binding.
- [21] Mr Fourie conceded that there was no clause in their contracts of employment which provides for the rate of overtime.
- [22] It was put to Mr Fourie that the dispute that was referred to the CCMA related to a change in overtime when the employees were paid a double rate overtime and the employer wanted to change it to a single rate and the parties agreed on a rate of 1,75. The current dispute related to a reduction of the overtime rate from 1,75 to 1,5 and therefore, it is not the same dispute and as this is a new dispute, it could not have been settled by the settlement agreement of April 2016.
- [23] After the Applicant adduced evidence and closed its case, the Respondent made an application for absolution from the instance.

Absolution from the instance:

- [24] The test for absolution from the instance sought at the close of the applicant's case is not whether the evidence led by the applicant established what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence could or might (not should, or ought to) find for the applicant. [2]
- [25] This implies that the applicant has to make out a prima facie case in the sense that there is evidence relating to all the elements of the claim in order to survive absolution because, without such evidence, no Court could find for the applicant.[3]
- [26] This is the test I must apply in the application for absolution.
- [27] The consideration of an absolution application entails some measure of evaluation of the Applicant's evidence, which must be compared to the agreed and accepted documentary evidence and the pleadings.
- [28] The issue this Court has to decide is whether the Respondent's non-compliance with the terms of the 2016 settlement agreement constitutes a breach of contract and whether the employees are entitled to specific performance.
- [29] Mr Matyolo for the Respondent submitted that the Applicant failed to establish a contractual claim for an overtime rate of 1,75 and the employees failed to prove any basis in law for their claim. He submitted that for the Applicant to succeed with their contractual claim, they must show that they had a contractual right to a rate of 1,75 to be paid for excess hours worked.
- [30] The evidence adduced before this Court established that there was no contractual provision as to the specific rate to be paid for excess hours worked. The Applicant in fact conceded that the rate to be paid was an issue that could be negotiated and agreed upon.
- [31] The Applicant's claim is premised on the terms of a settlement agreement, which they claim became part of their terms and conditions of employment. The Respondent's case is that the Applicant's claim is premised on an expired agreement.
- [32] Mr Matyolo submitted that the 2016 settlement agreement has served its purpose and has run its course and that it was concluded to settle another, separate dispute. The 2016 settlement agreement settled a dispute, which was referred under a specific case number, which related to a dispute where the employer sought to change the overtime rate from a double to a single rate and it was resolved that a 1,75 rate would be payable as from 1 April 2017. In 2022 the employer reduced the 1,75 overtime rate to 1,5 and it is evidently a new and a different dispute, which was not settled in 2016.
- [33] Mr Matyolo referred to specific clauses of the settlement agreement and submitted that this Court ultimately has to interpret the terms of the settlement agreement.

[34] The courts have considered the issue of interpretation on several occasions and the applicable principles are by now set as trite. The Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4] affirmed the principles applicable to the interpretation of legislation and contracts. What the judgment underscores is that the exercise of interpretation does not require a court to discern the intention of the legislature or the parties to a contract only by reference to the plain meaning of words with a deferential nod, if necessary, in the direction of the Oxford English Dictionary. The following was said: '

'The present state of the law can be expressed as follows: interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.... The "inevitable point of departure is the language of the provision itself" read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[35] And at paragraph 26, it was held that:

'In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'

[36] In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*[5], the Supreme Court of Appeal also considered the principles applicable to the interpretation of legislation and contracts and held that:

'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a

process that occurs in stages but is “essentially one unitary exercise”.

[37] In *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*[6], the Supreme Court of Appeal stated that:

‘...Endumeni has become a ritualised incantation in many submissions before the courts. It is often used as an open-ended permission to pursue undisciplined and self-serving interpretations. Neither Endumeni, nor its reception in the Constitutional Court, most recently in *University of Johannesburg*, evince skepticism that the words and terms used in a contract have meaning.’

[38] In interpreting the settlement agreement, meaning must be attributed to the words used in the document, having regard to the context provided by reading a particular clause or clauses in the light of the document as a whole and the circumstances attendant upon its coming into existence. Consideration must be given to the language used in the light of the ordinary rules of grammar and syntax.

[39] Clause 1 of the settlement agreement clearly indicates that the settlement pertains to CCMA case number GAJB 22574-15 and that it was the dispute under the said case number that became settled on the terms as recorded in the agreement. This confirms that the settlement agreement settled a dispute, which existed at the time of the conclusion of the agreement in April 2016, that it settled a dispute under case number GAJB 22574-15 and it cannot be understood or interpreted to be in settlement of any other or a future dispute.

[40] Clause 3 of the settlement agreement recorded that the settlement agreement was entered into by the parties in order to “finalise this longstanding dispute before the CCMA”. The agreement makes specific reference to a very particular longstanding dispute. This cannot be interpreted to include any other dispute but the one that was referred and settled under case number GAJB 22574-15.

[41] The dispute that was settled in April 2016 related to a change in the rate of pay for hours worked in excess and the change was from a double to a single rate, which the parties settled on the basis that a rate of 1,75 would be paid from April

2017. In 2022, Eskom implemented a rate of 1,5 for excess hours worked, which is clearly a change from the 1,75 rate that was previously agreed to. The 2022 change to the overtime rate is different from the change Eskom wanted to implement in 2016 and it cannot be understood to be the same dispute as the dispute that was referred and settled in 2016.

[42] The Applicant accepted that the rate payable for overtime is an issue that is subject to negotiation and it was not disputed that Eskom reviews the conditions of employment annually. Given the wording and the context within which the settlement agreement was concluded, it is evidently not an eternal agreement to pay an overtime rate of 1,75, more so as the rate of overtime pay is subject to annual review and negotiation.

[43] The onus is on the Applicant to prove the terms of the contract and to prove that there is a contractual obligation to pay them at the rate of 1,75 for excess hours worked and that the Respondent breached the terms of the contract when it amended the rate of overtime to 1,5 in 2022.

[44] In my view, the Applicant failed to make out a prima facie case and has failed to adduce evidence to discharge its onus and there is no evidence upon which this Court, applying its mind reasonably to the evidence, could find for the Applicant. It follows that the application for absolution from the instance should succeed.

Costs

[45] This Court has a wide discretion in respect of costs and in my view, this is a matter where the interest of justice will be best served by making no order as to cost. The parties have an ongoing relationship and the representatives for both parties submitted that each party was to pay its own costs.

[46] In the premises, I make the following order:

Order

1. Absolution from the instance is granted.
2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: For the Respondent: Mr D Basson from Solidarity Adv X D Matyolo Instructed by: Nkosi Sabelo Incorporated Attorneys

[1] GN 1665 of 1996: Rules for the Conduct of Proceedings of the Labour Court (repealed).

[2] See: Municipality of Christiana v Victor 1908 TS 1117; Van Rensburg v Reid

[1958] 2 All SA 319 (E); and De Wet and others v Western Bank Ltd 1977 (2) SA 1033 (W).

[3] See: Gordon Lloyd Page & Associates v Rivera and another

[2000] ZASCA 33; 2001 (1) SA 88 (SCA); Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A).

[4] [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.

[5] [2013] ZASCA 176; [2014] 1 All SA 517 (SCA) at para 12.

[6] [2021] ZASCA 99; [2021] 3 All SA 647 (SCA) at para 49.

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