

SOUTH AFRICA / JUDGMENT

Venter v Symington and De Kok (JS418/15) [2017] ZALCJHB 301; (2017) 38 ILJ 2828 (LC) (23 August 2017) [2017] ZALCJHB 301

COURT

Labour Court Johannesburg

BEFORE

Lagrange

CASE / FILE NUMBER

JS418/15

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THE

LABOUR COURT OF SOUTH AFRICA,

HELD

IN JOHANNESBURG

Case No: JS 418/15

In

the matter between:

SUNEL
VENTER
Applicant
and
SYMINGTON & DE KOK
Respondent

Heard:

25 – 26 August 2016

Delivered:

23 August 2017

Summary:

(Claim for overtime pay arrears – employer failing to keep record of time work – interpretation of s 31, 33(1) and s 76 of the BCEA – onus of proof of employee and employer – magistrates' court scale of costs might be appropriate in claims of this nature where quantum falls within jurisdiction of magistrate's court and that court has jurisdiction by virtue of s 77(4) of the BCEA)

JUDGMENT

LAGRANGE J

Introduction

[1] In essence, this case concerns a claim by the applicant for overtime pay which she claims was due and owing to her by the respondent for the period 15 September 2012 until her resignation on 30 September

2014. The applicant claims the following overtime pay is due to her:

1.1 R 73,380.84 for 2012;

1.2 R 96,241.14 for 2013, and

1.3 R 74,720.90 for 2014.

[2] The trial was conducted in Afrikaans on the understanding that the judgement would be handed down in English. The main factual dispute concerns the actual hours worked by the applicant and how those are to be established based on the evidence. The applicant, Ms S Venter ('Venter'), and Ms L Gouws ('L Gouws') gave evidence in support of the applicant's case, and Mr P Joubert ('Joubert'), Ms K Mahaleroe ('Mahaleroe'), Mr M Fransisco ('Francisco') and Ms H Gouws ('H Gouws') gave evidence for the respondent.

Synopsis of the evidence

[3] I do not intend to relate the verbatim evidence of the witnesses but merely to summarise the gist of their evidence in so far as it is relevant to the claim. One general comment which must be made at the outset is the general paucity of circumstantial evidence provided by either party in the form of documents supporting overtime practices and procedures as well as the record of hours worked. Such evidence of this kind which was tendered was of limited value and the evidence of both parties was mainly oral testimony. In a case in which a party is claiming remuneration for a specific number of hours worked, spanning a period of three years, the evaluation of the vague oral testimony which was given by both parties is frustratingly difficult for the Court.

[4] Venter was employed from 7 July 2008 in the debt collections department of the respondent, a firm of attorneys. The business of the respondent appears to be essentially a large scale debt collection operation with two major components: a legal collections

department (hard collections) and call centres (soft collections) which together employ approximately 700 persons. In terms of her contract, Venter's normal working hours were from 08H00 to 17 H00 from Mondays to Thursdays and from 08H00 to 16h 30 on Fridays.

- [5] According to Venter, she regularly worked overtime on Saturdays when requested to do so and did not refuse because she believed she would be adversely affected if she did. Usually, she would work two or more hours every second Saturday. In addition, she regularly worked three hours overtime every day during the week. Instructions to work overtime work would usually be made orally and not in writing by one of the attorneys and or partners of the firm, a claim which which was confirmed by L Gouws who had worked as a collection assistant in the firm. L Gouws also claimed to have regularly worked overtime during the week usually by coming in early to work but had seldom worked on Saturdays herself.
- [6] Usually, the request for overtime work would be couched in terms of an instruction to her to finish did you get the canvas certain work before she could leave, rather than been instructed to work as specific number of hours overtime. Overtime work was usually required when certain client deadlines had to be met. Clients set certain targets in the form of reports which had to be submitted and she was required to meet those. The requirement to meet these targets and the pressure created to do so was corroborated by L Gouws. She gave a particular example of the staff in her department being told they must issue 20 summonses a day but could only manage 8 per day in normal hours. Her supervisor said that they must make a plan even if it required them to work overtime. Venter said her workload was more than most senior typists and could not be completed in a normal day so it was impossible for her to finish work without working overtime. Some days she would work until 10 or 11 o'clock in the evening. Under cross examination she also claimed to have sometimes come in as early as 06h00 or 06h30 to work overtime. Mahaleroe testified that if deadlines had to be met which required overtime to be worked then that is something which would have to be arranged with the finance department. Personally she had never given Venter any instruction to work overtime but she would not have done so anyway because Venter did not work directly under her supervision.
- [7] Joubert readily acknowledged that everyone had goals to achieve as did the clients and that the associate members of the firm monitored whether goals were being achieved. However, according to him it was the policy that overtime work had to be arranged with supervisor. This was to prevent staff taking advantage of overtime hours by working at a slower pace during ordinary hours and then being able to earn overtime rates of pay to finish work. Mahaleroe also testified that overtime was rarely worked and every effort was made to try and ensure that work was done during working hours to avoid overtime work. If overtime had to be worked, it would be a case of "all hands on deck" to minimise the amount of overtime worked. Generally, work of corporate clients could be managed in ordinary working hours. Overtime was always worked at the employer's request and not at the employee's initiative.
- [8] Venter's workload began to increase in 2011 and 2012 owing to increased demands of three clients namely, FNB, SLB and SAB. When she complained about the workload she was told she must 'handle it'. Most of her work instructions came from Ms Slabbert, Joubert and Francisco. When Joubert was asked whether an instruction to work overtime would be given

if the workload increased he said that as far as he was aware, it had not occurred but such an instruction could have been given by the associates supervising her. Both Joubert and Francisco testified that at some stage Venter had complained about her workload and a certain client's book had been removed from her work responsibilities. This evidence was never canvassed with Venter.

- [9] Apart from the general salary increases she received, Venter did not dispute that her salary had also been increased significantly when her workload had grown because of the new reporting requirements of SAB. In March 2012, her monthly salary was increased by R 3,220-00, amounting to an increase of nearly 50%. Venter did not dispute that this increase had been given to her in recognition of the increased workload she had been given and because she had made representations to Slabbert, though she could not specifically recall this and claimed not to know the reason why she would have received such a large increase. When Joubert testified, he attributed the higher salary to the more responsible work that Venter was doing in handling national clients rather than local Bloemfontein clients. He did not attribute it to her having to work longer hours, which would have included overtime, to deal with the workload. The following year, her salary increased by approximately 24%, which the respondent claimed was also in recognition of her increased workload, which Venter did not deny. It was put to Venter that the only reason she might have worked beyond her normal working hours was because she could not cope, not because she was asked to work overtime and that, accordingly, she worked voluntarily in excess of her normal hours and without the employer's consent. However, she insisted that she was regularly told to finish her work, by which I understood her to be saying that the instruction to finish her work necessarily implied she would have to work overtime. L Gouws claims to have heard Venter being instructed on occasion to finish work and that she was sometimes in the office early and still there when she left. However, Joubert claimed that in the last few months, he seldom saw Venter after hours. He freely acknowledged though that she worked in a different section of the office from him and he would not have seen her.
- [10] Francisco said that it could happen that staff could work additional hours without asking permission to do so and it was possible that if someone worked until 17H30 he might not realise it. He generally worked until 18H30 or 19H00. Although it was not raised in cross-examination of Venter, Francisco said he regularly worked on a Saturday but could not remember seeing Venter there. H Gouws had worked at different ends of the building from Venter during the last four years but had to go past Venter's workplace to reach her own. On many days, she would not see Venter, but on many other days Venter was still there when she left. However although she went in on many Saturdays she never saw Venter on those occasions. H Gouws claimed that when she worked on Saturdays, she was getting up-to-date and never claimed for the hours she worked because it was not important to do it.
- [11] Venter never received payment for the overtime hours she worked. She claimed that she calculated the overtime hours she had worked by using the times that she accessed and exited her computer using her personal code and password. There was a clocking system at

the door but this was not always reliable and was not used to calculate her claim. She agreed that the security access record was not used as a clocking record for salary purposes. However, it did provide some evidence of her hours of attendance at work. Thus, on Saturday 13 October 2012 it showed that she came to the office just after 10H00 and left just over two hours later. Under cross examination, it was put to her that if overtime was worked then a record of it being authorised would have been kept by the firm on an email from Mohaleroe or her supervisors Miguel and Slabbert, and that was the only method by which it was supposed to be recorded. Venter said she could not dispute that. On the other hand, Joubert conceded that the clocking record might show that Venter had worked on Saturdays on 20 and 27 October 2013 but if she had done so, that had been her own choice to work in order to get up to date and provided she had arranged it with her associate supervisor there would be nothing untoward about that.

- [12] Venter also conceded that even if the security access record was not a record of time actually worked that it did not give a general impression of working three hours overtime a day on average.
- [13] She claimed that when she queried the lack of overtime pay with one of the partners, Joubert, he told her that there was no chance of getting overtime pay as they did not pay for overtime work. She claimed that she had raised it with Ms S Slabbert, one of the attorneys she worked for, but was told that the chances of her getting it were not good. She got the feeling she could lose her job if she pursued the issue of overtime pay and she needed the work. However, she could not identify one of the many staff working for the respondent who had been dismissed on account of a dispute over overtime pay or refusing to sign a written contract. Joubert denied ever giving Venter any reason to believe that she would be prejudiced if she did not sign her contract. L Gouws testified that she had refused to work overtime and on that occasion, it had been insinuated that she was placing her job in jeopardy. Despite this, in later years she increasingly refused to work overtime because she felt the pay was insufficient. Venter testified that she did not keep a record of her overtime hours but believed it was not necessary because the IT department could provide the information, but when she asked Mohaleroe for such information for the first time in September 2015, she told her it was not possible to do so.
- [14] In her original general terms and conditions of employment which applied to her when she accepted appointment as a collections typist in 2008, the provision relating to hours of work provided for working hours from 08H00 until 17H00 from Monday to Friday excluding a daily lunch break of one hour. The overtime provision simply stated that overtime would be worked by agreement when requested by the employer. Subsequently, in February 2014, Venter was issued with another contract, which contained far more detailed provisions pertaining to hours of work, as follows:

“7. HOURS OF WORK

7.1 Ordinary hours of work for employees of the employer will be 42 (forty two) per week.

7.2 A 5 (five) day week will be worked.

7.3 the maximum working hours per day will be no more than 8½

(eight and a half) hours, lunch break included.

8. NORMAL WORKING HOURS

Normal working hours Monday to Thursday shall be from 08:00 to 13:00 and 14:00 to 17:00 and on Friday from 08:00 to 13:00 and 13:30 to 16:30.

9. TEA/SMOKE AND LUNCH BREAK

9.1 The employee shall be granted a tea/smoke break of 10 (ten) minutes in the morning and 10 (ten) minutes in the afternoon.

9.2 The employee shall be granted a lunch break of 60 (sixty) minutes in the afternoon as scheduled by the employer on Monday to Thursday between 13:00 and 14:00 and Friday between 13:00 and 13:30.

10. OVERTIME

10.1 The employee agrees to work overtime when required and deemed necessary by the employer. Overtime should not be seen as a right, but during exceptional circumstances it may be required.

At least 24 (twenty four) hours' notice will be given to the employee requesting him/her to work overtime. This period of notice can only be shortened in the case of unforeseen or exceptional circumstances e.g. power failures, technical breakdowns, etc.

10.2 Overtime will not exceed 10 (ten) hours per week.

10.3 Overtime will not exceed 3 (three) hours per day.

10.4 if it is required that the employee works overtime, the employee will be paid at a rate of 1½ (one and a half) times his/her hourly rate."

The contract says nothing specifically about Saturday work but clause 11 specifically stated that an employee would not be required to work on a Sunday. Clause 12 also provided that 'under exceptional circumstances' an employee may be required to work on a public holiday. Mohaleroe testified that there was a procedure in terms of which employees would be asked if they could work overtime and then she would notify the HR department which would send an email confirming the agreement and she would have authorised the working of overtime. Mohaleroe stated that she would personally have to be present when overtime was worked so she could lock up afterwards. This contention was not put to Venter under cross-examination.

[15] It was suggested to Venter that she could not have worked late because she did not have an access code and that one of the

supervisors could have armed the alarm at the premises when everyone left. However, Francisco seem to recall her working late with him to finish certain tracking reports, but that it was not his job to report any overtime she had worked to Mohaleroe. According to him he would send requests to staff to work overtime to HR and he would confirm the arrangement. He claimed that staff would confirm the number of overtime hours worked with him and he was not sure if HR checked this against clocking system records. H Gouws gave similar evidence about the arrangements that would be made if the staff were asked to work overtime. She had not been asked to work overtime regularly, but did say that it depended on the degree of pressure there was to finish work. On the three or four occasions she had worked overtime she had been paid for it.

- [16] Venter agreed that the overtime regime she claimed to have worked was in conflict with provisions of the revised contract like clauses 10.1 and 10.3. She claimed she discussed the discrepancies between the contract and her actual working conditions with Mohaleroe but could not remember what Mohaleroe had said except that it was a standard contract which she had to sign. She could not recall Mohaleroe saying that no overtime should be worked unless it was requested or that she should take up any problems she had with the contract with Joubert. Once again, she feared losing her job if she did not sign it. However, she did not dispute that her relationship with Joubert and Slabbert was reasonable and that Slabbert would listen to her complaints about her hours, but she would not go as far as conceding that Joubert was approachable and understanding. In this regard it was put to her that she was granted additional leave by Joubert, but she could not recall this on account of not having the leave slips. However, she did agree that she was given considerable study leave.
- [17] Venter's estimation of the overtime hours she claimed to have worked left a great deal to be desired. It was put to her

cross-examination that the data of the C3 call centre software which she used in the course of her work would not give a complete picture of her working hours. Joubert claimed that the C3 data was not kept for longer than three months in any event and was essentially just a system for managing different clients' debtor's books. She was reluctant to concede that the times reflected in the access and exit security system was a reasonable reflection of her working hours and that the odd occasion when it showed that she had only been on the premises a minute was simply when the swipe card took too long to register on the system.

- [18] As to the calculation of the sums claimed for alleged overtime pay in arrears, Venter was vague about the method used to estimate the amounts she had claimed, which she said had been calculated by her attorney. She maintained that the calculation must have been based on her instructions to her attorney that the entire collections department worked four hours on a Saturday at least once a month, and on other Saturdays a couple of hours assisting the call centre staff in addition to two to three hours overtime worked on weekdays. Mohaleroe claimed she would never have given such an instruction and would have to have been present when such work was done and she had two children so she would not have been able to do this. As mentioned, this detail was not something put to Venter during her cross-

examination. Francisco, who was Venter's direct supervisor for the last seven months she worked for the respondent could not recall any Saturdays when she had been asked to work four hours or any other Saturdays when call centre backlogs were addressed. He did not deny that it could happen that backlog work had to be done but it would not be unpaid overtime work. H Gouws, who had worked for 17 years for the respondent in the collections department and had worked the last four years under Mohaleroe said that nobody in the last four years in her section had worked overtime on Mondays to Fridays nor had anyone been asked to work two Saturdays in a month. She also disclaimed any knowledge of staff working four hours on Saturdays at month-end.

[19] Joubert testified that doing collection work on a Saturday was pointless because debtors were not at home. However, this was never put to Venter under cross-examination. If call centre targets could not be met, the firm sometimes asked typists to phone debtors during working hours but never after hours. Joubert could not understand how Venter could have worked the hours she said she did and never put in a claim for overtime pay.

Evaluation

Keeping records of hours worked and proof of wage claims

[20] S 33 of the Basic Conditions of Employment Act dealing with information about remuneration provides inter alia that:

33 (1) An employer must give an employee the following information in writing on each day the employee is paid:

...

- (c) the period for which the payment is made;
- (d) the employee's remuneration in money;
- (f) the actual amount paid to the employee; and
- (g) if relevant to the calculation of that employee's remuneration-
- (i) the employee's rate of remuneration and overtime rate;
- (ii) the number of ordinary and overtime hours worked by the employee during the period for which the payment is made; ..."

(emphasis added)

S 31 of the BCEA further makes provision for an employer to maintain certain records for a period of three years from the last date of entry in that record, viz:

"31 Keeping of records

- (1) Every employer must keep a record containing at least the following information:

- (a) The employee's name and occupation;
 - (b) the time worked by each employee;
 - (c) the remuneration paid to each employee;
 - (d) the date of birth of any employee under 18 years of age; and
 - (e) any other prescribed information.
- (2) A record in terms of subsection
- (1) must be kept by the employer for a period of three years from the date of the last entry in the record.
 - (3) No person may make a false entry in a record maintained in terms of subsection (1).
 - (4) An employer who keeps a record in terms of this section is not required to keep any other record of time worked and remuneration paid as required by any other employment law.”

Lastly under s 76 of the BCEA, in any proceedings about a contravention of the Act, the employer must prove the accuracy and validity of any record it maintains and, if it has failed to keep such a record relevant to the proceedings, it must prove it has complied with the Act, viz

“76 Proof of compliance

- (1) In any proceedings concerning a contravention of this Act or any sectoral determination it is for an employer-
 - (a) to prove that a record maintained by or for that employer is valid and accurate;
 - (b) who has failed to keep any record required by this Act that is relevant to those proceedings, to prove compliance with any provision of this Act.”
- [21] It follows from the above that the respondent was obliged to keep records of Venter’s remuneration and the time she worked for a period of at least three years after her last working day. It did not keep records of the time she worked, contrary to its obligations under the BCEA. The only record it claims it would have kept of any overtime she worked would have been email authorisations for the overtime worked. The record of hours worked by Venter was most material and relevant evidence in these proceedings.
- [22] Consequently, the respondent’s failure to keep a record of Venter’s hours worked means that it failed to keep a record relevant to these proceedings and therefore insofar as it claims it is not liable for overtime pay it must prove it acted in compliance with the provisions of the BCEA relating to overtime pay. In its answering statement the respondent disputed that it was indebted to the Applicant for “any overtime whatsoever and consequently denies that it contravened the provisions of the BCEA”. If overtime was worked it is therefore for the respondent to prove that it is not liable to the applicant, but this still presupposes that it is first established that overtime was worked and the onus of establishing that rests on the

employee.

- [23] The difficulty for the applicant is that even if she cannot be responsible for not having a comprehensive record of the hours she worked, which was the respondent's responsibility, she must at least establish on a balance of probabilities that overtime was in fact worked and when it was worked. I appreciate that this onus is more difficult to discharge in the absence of the record of hours the employer is required to maintain, but as long as employees can establish on a balance of probability that they did work overtime on certain occasions, that should be enough to shift the burden of proving compliance with the BCEA overtime regime to the employer, if the employer kept no records of working time.
- [24] The first issue raised by the respondent is that if Venter worked beyond her normal hours on one or more occasion, she still needed to prove that this was done with its consent, because overtime had to be arranged by agreement. Venter never claimed that she was expressly requested to work overtime in so many words. The form in which need to work overtime was expressed to her was by way of an instruction that she was to finish certain work before she could go home. Since that could not be done by the time ordinary working hours ended, in effect it was an instruction to work overtime until the job was completed. It does stand to reason that if such an instruction was given, it contains an implicit acknowledgment that the employee would be working beyond normal working hours, because there would be no need to say the employee could not leave before the work was done unless it was anticipated the employee may have to work beyond the time they would normally be entitled to leave. On account of my conclusion that in effect the respondent did implicitly instruct to Venter performing overtime and this constituted a request or instruction to do so, it is not necessary to enter the debate about whether she ought to have been compensated for hours worked in excess of her ordinary hours without the employer's consent.
- [25] S 10(1)(a) of the BCEA stipulates inter alia that an employer may not require or permit an employee to work overtime "except in accordance with an agreement". The provision relating to overtime in the conditions of employment which applied to the applicant from 2008 until she signed her second contract of employment in 2014 was brief. It merely stated summarily:

"1.2 Oortyd by ooreenkoms soos en wanneer deur die Werkgewer versoek"

Apart from echoing s 10(1)(a) in making it clear overtime work had to be by mutual agreement it would be initiated at the respondent's

request. The provisions of the 2014 contract cited previously were more elaborate. Firstly, they made it clear that the employee agreed in advance to work overtime at the instance of the employer ('when required and deemed necessary by the employer') and on twenty four notice to the employee, which could be shorter in "unforeseen or exceptional circumstances". However, nothing in the contract required the instruction to be made in writing, nor did it stipulate procedures for authorising overtime work, such as those testified to by the respondent's witnesses. Thus, on a plain reading of the contracts, nothing prevented a request or instruction to

work overtime being conveyed orally to Venter and there was no prescribed manner in which she had to express her assent, to the extent she might have been lawfully entitled to refuse the request.

[26] As a result, I am not persuaded that the applicant could have refused to work overtime in terms of either of her contracts merely because the various confirmatory emails between her supervisor and the HR department had not been sent. Those arrangements were not something she could oblige the respondent to comply with as a precondition to her working overtime. Provided she got an oral instruction from her superior to work overtime, that would have been sufficient to constitute a request or instruction, depending on the applicable contract. If she waived the requirement that she was entitled to be given 24 hours' notice, the respondent could hardly rely on her waiver of a provision which was plainly inserted to protect her interests to argue that a request to work overtime on short notice relieved it of the obligation to pay for the overtime hours she actually worked pursuant to that request.

[27] The next question is whether such a request was made or instruction given. The applicant contends this was implicit when she was told not to leave until she finished work. For the reasons mentioned above, I agree that such an instruction would be sufficient to constitute a request to work overtime until a task was completed. It is apparent that there were regular client deadlines that had to be met and that might well have necessitated working after hours on occasions. The difficulty is with establishing how often that is likely to have happened. In this regard the applicant's evidence mainly consisted of sweeping generalisations about the frequency and extent of overtime she worked. Her version of her Saturday work also changed in the course of her own testimony. Initially she claimed she worked two weekends per month for two or three hours, and later said that the Saturday arrangement became a fixed arrangement in terms of which the whole department had to work not less than four hours from 08H00 to 12H00 and on the alternate Saturday for at least two to two and a half hours. To the extent that she could corroborate her claims L Gouws could only confirm that overtime work was the norm, but could not confirm the general practices in Venter's department as she did not work there. H Gouws and Fransisco did acknowledge that Venter was sometimes seen at work after hours, but there was little oral

evidence to corroborate Venter's claims about Saturday work. The only circumstantial evidence of her attendance at work are the security access records for the period 3 September 2012 until 16 September 2014. That was the only evidence which could provide more specific corroboration of the occasions Venter was at work after hours. That record itself is very problematic as it appeared to be incomplete in a number of respects.

[28] For example, the record for the ten day period from 3 September up to and including 13 September 2012 only indicates Venter having been on the premises for any substantial period of time on 11, 13 and 14 September (all weekdays). Further, if that record was used as an indicator of hours worked would suggest she only worked a total of barely 17 hours all of which took place on weekdays. Taking the two years of clocking records as a whole and

taking into account all weekdays on which Venter appears to have been at work for more than a 9 hour interval and then allowing for only a quarter of an hour between the time she passed through security and started working, in the entire period from 3 September 2012 until 16 September 2014, she would appear to have worked 127.75 hours overtime over 92 weekdays and only 10.88 hours on three Saturdays. It does seem that some of the periods of longer hours do seem to appear towards the end of months but the pattern is not predictably regular. What the circumstantial evidence suggests is that she probably did work overtime on a reasonably regular basis. However the degree of regularity of overtime work was nothing like the daily, weekly and monthly regularity she claimed to have worked and Saturday work was a rare event. There was really no evidence apart from her own to support Venter's claim of regular fortnightly Saturday work. Even allowing for the limitations of the access records, it would be tendentious to assume that because of those inadequacies, the fact that Venter was shown to have been on the premises on 3 Saturdays is sufficient to corroborate her claim of regular fortnightly Saturday overtime work.

- [29] Likewise, on those weekdays when she did appear to have been on the premises longer than 9 hours and 15 minutes, the average additional time spent at work was just over 1 hour and 23 minutes which is a far cry from the three hours overtime she claimed to have routinely worked. If one has regard to the months of September, October November 2012, January, March, April, May, June, July, August, September, October and November 2013 and January, March, April, May, July and August 2014 the average number of days on which Venter was recorded at work is 18.57 per month, whereas the normal average working days per month should be 21.65 (4.33 weeks x 5 days). Months where the dates on the access record indicated date gaps of entire week or more, therefore suggesting the applicant may have been absent from work, or months like December were excluded because annual shutdowns seems to have affected the working days. Taking the above into account it is reasonable to infer that the attendance records probably failed to record attendance on about 14 per cent of days worked. In addition approximately 44 % of the access records can assumed to be inaccurate records of her work attendance because they record attendance at work of 3 minutes or less. Accordingly a further adjustment should be made for the lack of a proper attendance record on those days. For these two reason, to the extent they may serve to corroborate the applicant's vague oral testimony they may understate the number of days she worked overtime to the same extent.
- [30] Even making allowance for this, it is difficult to reconcile with the applicant's claims. While the access records may not have been an accurate record of actual hours worked, there was no reason advanced why they would not have reflected the maximum time Venter could have worked on the days when her access was properly recorded. As such they provide valuable circumstantial evidence, and I see no reason why they should not be accepted as a more reliable indicator of the probable overtime hours worked on any particular day by the applicant than her own oral testimony. Accordingly, I have concluded on a balance of probabilities, taking into account the 14 % of days which appear completely unaccounted for on the attendance record and the fact that on about 44 % of the days when she did work

the access record cannot be used as a measure of time at the premises, the 92 days where she was recorded as being at work beyond 9 hours and 15 minutes needs to be adjusted to compensate for that gap. On that basis it would be reasonable to infer that on about 145 days Venter probably worked just over 1 hour and 23 minutes overtime during the two year period under consideration.

- [31] Taking into account the fact that Venter's salary was R 9,720, R 12,000 and R 12,950 for the periods beginning 1 March 2012, 1 March 2013 and 1 March 2014 respectively and, her overtime hours and remuneration due for the relevant periods, before any adjustment is made for the access record deficiencies are set out in the table below. For the purposes of adjusting for the shortcomings of the access record by extrapolating the results of 42 % of the available access record, it is assumed those deficiencies were evenly distributed over each period.

Period	Overtime hours per access record	Hourly rate of pay	Amount due before adjustment	Adjustment amount	Amount due after adjustment
3 September 2012 to 28 February 2013	59.67	R 53.45	R 3189.22	R 4401.13	R 7590.35
1 March 2013 to 28 February 2014	59.21	R 65.98	R 3906.96	R 5391.61	R 9298.57
1 March to 26 August 2014	8.12	R 71.26	R 632.11	R 872.31	R 1504.42
Totals	127.75		R 18393.34		

- [32] To the above amount must be added the R 581.51 for the 10.88 hours overtime worked on a Saturday in the first period. I have not extrapolated this isolated record of Saturday work because there is simply no convincing evidence that overtime work was done on Saturdays except on an exceptional basis.

- [33] In the applicant's written heads of argument her counsel referred to, without specifically citing the judgment, the emphasised portion in the extract below from the judgment of the LAC in *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*[1], in which there was no dispute, the respondent employee had worked overtime but the only evidence tendered about the amount of overtime worked was his own. The LAC stated,

"[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 G 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, H the following calculation is adopted to make the necessary award:

1 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."

The court went on in similar vein to calculate the remaining overtime hours due to the respondent. While the court made it clear it will estimate what is fair in the absence of other evidence and where the evidence before the court is of poor quality, that does not mean that a claimant is not required to make an effort in assisting the court in the form of submissions in argument as to how that estimate should be arrived at. In this instance, the court had to sift through the raw undigested evidence of the access records to arrive at an estimate which is fair to the applicant in the absence of being able to arrive at an estimate from the vague and general evidence of the applicant. Perhaps, the applicant realised that any close analysis of that record would not yield the result she hoped for, but the failure to make any meaningful attempt to deal with the quantification of the claim when submitting heads of argument is deplorable and could easily have attracted an order disentitling the applicant's attorney to a fee for the heads of argument. The Marsland judgment is not authority for legal representatives adopting an insouciant attitude towards their own responsibility to estimate a claim in cases where the evidence is something of a proverbial 'dog's breakfast'.

Costs

- [34] The applicant has at least been successful in proving the essence of her claim that she did perform overtime work which was unpaid, though the quantum of arrear overtime pay due falls far short of the amounts she estimated. The respondent also failed to comply with fundamental record keeping requirements of the BCEA. If it had kept proper records, this litigation would probably never have arisen, since any entitlements to overtime pay would have been simple to calculate. In my view, given that the firm is a large employer and a firm of attorneys, that alone would have disentitled the respondent to any entitlement to costs even if it had been successful.
- [35] However, a word of caution must be sounded about routinely launching claims of this nature which could just have easily have been brought in the Magistrate Court. If the quantum of the claim is one that clearly also falls within the jurisdiction of the Magistrate Court and if there is no other reason why the claim could not have been brought as an ordinary civil claim as provided for in under s 77(4), which creates an exception to the principle that the Labour Court has exclusive jurisdiction in respect of all matters arising under the BCEA[2], then a claimant should not automatically expect that costs will be awarded on the High Court scale.
- [36] I mention this because, if the respondent had argued that this claim could have been brought in the Magistrate's Court, and had warned the applicant that in the event she was successful it should not be held liable for costs on the High Court scale, it might justifiably have argued that she should not be entitled to her costs on the High Court scale. However, in this instance this was not raised by the respondent.

Order

- [1] The respondent is liable to the applicant for overtime pay for the period 3 September 2012 to 26 August 2014 in the amount of R 18,974.85, comprising R 18,393.34 for overtime worked on weekdays and R 581.51 for overtime worked on Saturdays respectively and must pay the applicant the said amount within 15 days of the date of this

judgment.

- [2] The respondent must pay the applicant's costs.
- [3] The Registrar is directed to send a copy of this judgment to the Head of the Labour Inspectorate of the Free State Provincial Department of Labour drawing his or her attention to the respondent's apparent non-compliance with provisions of the Basic Conditions of Employment Act relating to maintaining records of employees' working time.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

J Keet of Keet Attorneys

RESPONDENT:

M C Louw instructed by Symington & de Kok

[1]

(2009) 30 ILJ 2875 (LAC) at 2884

- [2] S 77(4) states: "Subsection (1) does not prevent any person relying upon a provision of this Act to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court or an arbitration held in terms of an agreement."

- [2] S 77(4) states:

"Subsection (1) does not prevent any person relying upon a provision of this Act to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court or an arbitration held in terms of an agreement."

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