



ARBITRATION AWARD

Panellist: M Naidoo
Case No: PSCB393-16/17
Date of Award: 21 June 2017

In the ARBITRATION between:

SAMA obo MOHLAMONYANE, T

(Union / Applicant)

And

DEPARTMENT OF HEALTH - GAUTENG

(Respondent)

Union/Applicant's representative: Mr Modisane Lelaka
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Details of hearing and representation

- [1] The arbitration was scheduled for 1 June 2017 at the offices of the Public Service Co-ordinating Bargaining Council (**PSCBC**) in Tshwane. The proceedings were digitally recorded. On 1 June 2017 I issued a Ruling, by agreement with the parties, directing the applicant to deliver a *statement of case* by 6 June 2017 (**“the statement of case”**); the respondent to deliver an *answer* to the applicant’s statement of case by 12 June 2017 (**“the answer”**) and the applicant to deliver a *reply* to the respondent’s answer by 15 June 2017 (**“the reply”**).
- [2] The applicant, Doctor T Mohlamonyane, was present, during the proceedings and represented by Mr Modisane Leleka, an official of the South African Medical Association Trade Union (**SAMA**). The respondent, the Gauteng Department of Health, was represented by Ms Tebogo Makhubela, its deputy director: labour relations. The proceedings were conducted in English. No interpretation services were used.

Issues to be decided

- [3] I am required, in this arbitration, to interpret and apply the provisions of section VII, clause 8 of PSCBC resolution 3 of 1999 (**“the resolution”**). In this regard I am required to determine whether the applicant was entitled to, and whether the respondent had paid him, a monthly *commuted* overtime allowance (**“the allowance”**), for May and August 2016, in compliance with the resolution. I am also required to determine whether the deduction made by the respondent, of R14 259.78, from the applicant’s August 2016 salary, was an irregularity in breach of the resolution.

Background to the issues in dispute

- [4] The applicant is employed by the respondent as a medical doctor. The applicant contends that the respondent deducted, from his August 2016 salary, an amount of R14 560. He points out that this deduction is reflected in his August 2016 salary advice (**“the salary advice”**). However, the actual deduction reflected in the salary advice is “R14 259.78”. (**“the deduction”**). The respondent iterates, in the salary advice that the deduction is for “*disallowance fixed overtime*”.
- [5] The applicant was aggrieved by the deduction. He contends that the deduction was in contravention of the resolution as he was entitled to a fixed monthly allowance for overtime actually worked in terms of his performance contract. Hence, the deduction was an irregularity.

- [6] The applicant referred an *interpretation/application* dispute with the PSCBC on 13 September 2016. The PSCBC Form C1 was sent to the respondent by fax on 13 September 2016. The dispute was conciliated on 10 January 2017. It remained unresolved.
- [7] On 10 April 2017 the applicant referred the dispute to the PSCBC for arbitration. The arbitration referral form was sent to the respondent by fax on 17 January 2017. The PSCBC directed the parties, by letter dated 11 April 2017, to hold a pre-arbitration conference. I perused the PSCBC case file. I did not locate any pre-arbitration minute. The parties did not draw my attention to any pre-arbitration minute.
- [8] On 5 May 2017 the PSCBC sent a notice to the parties setting the dispute down to be arbitrated on 1 June 2017. On 1 June 2017 the parties agreed, between themselves, that there was no need to lead any oral evidence in the arbitration. The respondent submitted a bundle of documents which I marked bundle “R”. The parties agreed on the authenticity and content of the documents included in bundle “R”, with the exception that the applicant did not agree that the policy issued by the respondent under personnel circular letter 11 of 2016 (pages 28 to 48), was enforceable. The applicant contended that the policy was not properly approved in the bargaining council; as was required before its implementation.
- [9] The parties further agreed that, in the circumstances, it would be in the interests of the efficient finalisation of the arbitration, if the parties could rather make written submissions in the form of the *statement of case*, the *answer* and the *reply*. I accordingly issued a ruling directing the parties to deliver the respective written submissions. The applicant delivered the *statement of case* on 6 June 2017; the respondent delivered the *answer* on 9 June 2017 and the applicant delivered the *reply* on 15 June 2017.

Summary of the evidence and arguments

- [10] PSCBC Resolution 3 of 1999 is a collective agreement which was concluded by the parties at the bargaining council on 4 February 1999. The relevant extract of the resolution states:

AGREEMENT ON REMUNERATIVE ALLOWANCE AND BENEFITS

...
VII. Overtime

...
8 Overtime allowance

- 8.1 The employer may pay an employee a fixed allowance to compensate for overtime if
- (a) The employee performs reasonably similar amounts of authorized overtime, Sunday work or night overtime from month to month, and
 - (b) The employee agrees in writing.
- 8.2 The allowance shall equal the average monthly compensation the employee received for overtime in the six months preceding the establishment of the allowance.

[11] On 15 March 2016 the respondent and applicant concluded a written “*performance contract for commuted overtime*” (“**the contract**”). The contract was fixed for the period 1 April 2016 until 31 March 2017. The applicant chose, in the performance contract, the following overtime option:

“*OPTION D I elect to participate in the commuted overtime dispensation in the group (13 – 20 hours per week). I accept that I will be automatically excluded from further participation in the dispensation in the event of any refusal or hesitance on my part to perform overtime. ... The overtime rate is linked to my salary, and is set at 1.3 times my hourly rate, as determined by my salary notch.*”

[12] According to section VII clause 3 of the resolution the respondent is required to negotiate a policy governing the conditions, compensation and categories of employees relating to overtime; before the implementation of the overtime provisions of the resolution. By personnel circular minute 43 of 2011, dated 1 July 2011, the respondent issued a notice asserting that the attached “*Commuted Overtime Policy*” (“**the policy**”) was to be implemented. The applicant disputed that the policy had any legal effect as it was not a negotiated collective agreement. “*Commuted overtime*” is defined in the policy as “*regular (fixed) payment for irregular after-hour services*”.

[13] The applicant averred that he worked his commuted overtime in August 2016. The respondent reflected, in his August salary advice, that he had indeed worked such commuted overtime. He did not dispute that the commuted overtime, as agreed, must be *actually* worked to qualify for the payment. He pointed out that respondent, despite crediting him for his August 2016 commuted overtime allowance; nevertheless, debited him, in the August 2016 salary advice, when it effected the deduction. The respondent asserted, in the August 2016 salary advice that the deduction was for “*disallowance fixed overtime*”. The applicant exclaimed that the respondent did not have the authority to do this as the resolution granted him the right to such an allowance.

[14] The respondent did not dispute that the applicant was entitled to the allowance as set out in his *statement of case*. It also did not dispute that the applicant had indeed worked his scheduled overtime during August 2016. The respondent pointed out that it did pay the applicant his commuted overtime allowance for August 2016, as is so reflected in his August 2016 salary advice.

[15] The respondent explained that the deduction was done because the applicant failed to pitch up for work for his scheduled overtime on 3 and 6 May 2016. The respondent erroneously paid the applicant his full commuted overtime allowance for May 2016. It did so because it was unaware, at the time that the applicant had in fact not pitched up for work as scheduled. A colleague, who was compelled to substitute for the applicant, later brought this to the attention of the respondent.

- [16] The applicant did not dispute that he had in fact not pitched up for work as scheduled on 3 and 6 May 2016, that a colleague had to substitute for him and that he was erroneously paid the full May 2016 allowance. He averred, in his *reply*, that the respondent had no right to deduct any such alleged erroneous payment from his salary unless he had consented, in writing, for such deduction. The applicant went on to assert that he was only under a duty to work 13 to 20 hours per week and that anything above this should be governed by option E. The applicant is most likely referring to option E of his performance contract, which he did not choose to be governed by. He chose option D.
- [17] The respondent made several written requests to the applicant to reimburse the respondent for the erroneous payment. The applicant did not respond to the written requests. The respondent then made the deduction and recouped the erroneous payment.

Analysis of evidence and arguments

The applicable legal principles

- [18] The Constitutional Court (“**CC**”) explained in *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at [65] and [66]:

“... commissioners must ... resolve the real dispute between the parties.

...

In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration.”

- [19] The Labour Appeal Court (“**LAC**”), per Sutherland JA (with whom Ndlovu and Musi JJA concurred), in *Hospersa obo Tshambi v Department of Health, KwaZulu-Natal* [2016] 7 BLLR 649 (LAC) at [16] and [17] (“**the Hospersa case**”) stated:

“An arbitrator is required to determine the true dispute between the parties. To that end, it is necessary to establish the relevant facts and construe the category of dispute correctly. An arbitrator must make an objective finding about what is the dispute to be determined.

...

What is a “dispute” per se, and how one is to recognise it, demands scrutiny. Logically, a dispute requires, at minimum, a difference of opinion about a question.”

- [20] The LAC went on to define what an *interpretation* dispute is. It stated at [17] and [19]:

“A dispute about the interpretation of a collective agreement requires, at minimum, a difference of opinion about what a provision of the agreement means. A dispute about the application of a collective agreement requires, at minimum, a difference of opinion about whether it can be invoked.

...

The idea that the breach of a right that derives from a collective agreement is automatically a dispute

contemplated by section 24 is wrong. Section 23, which provides for the enforceability of collective agreements and section 24 need to be read together. Together they create the legal edifice for the legal effect of collective agreements and certain disputes which take place about them. Sections 23 and 24 are located in chapter III of the LRA. That chapter deals with collective bargaining. Part A of chapter III addresses organisational rights, and Part B addresses collective agreements. Section 23 and 24 are in part B. Parts C and D address bargaining councils. It is plain that section 24 is a procedure to oil the wheels of the collective bargaining process and an efficient resolution of disputes about collective agreements.”

- [21] Thompson and Benjamin, *South African Labour Law*, AA1-141, remarked at the time of the enactment of section 24 in the initial 1995 statute that (See the *Hospersa* case at [20]):

“Collective agreements are legally enforceable instruments. Any dispute over the interpretation or application (which would include enforcement) of a collective agreement is a rights dispute ...”

- [22] Sutherlands JA reasoned, in the *Hospersa* case at [21], that:

“This perspective of section 24 articulates the significance of locating this category of disputes about collective agreements in the arbitral process; i.e., the advantage of a speedy resolution of disputes ... By contrast, individual disputes about employer unfairness are provided for in chapter VIII of the LRA, where section 186(2) is to be found.

The bald statement by Thompson and Benjamin that “application” includes enforcement is unmotivated and is, in my view, insupportable, if what is meant is that any breach of a collective agreement triggers a right to invoke the collective agreement as a cause of action to be adjudicated, pursuant to section 24. A better reading of Thompson and Benjamin is that it is implied that once “application” is proven, the referring party can procure more than just a declaratory order, and can obtain, pursuant to such finding, substantive relief.”

- [23] In so far as enforcement is concerned, Revelas J, in *NUCW v Oranje Mynbou en Vervoer Maatskappy Bpk* [2000] 2 BLLR 196 (LC) at [8] to [9], reasoned that:

“Whether a dispute about the “application” of a collective agreement, referred to in section 24(1) of the Act, would include the enforcement of a collective agreement when it is breached, is a further question which needs to be decided.

Enforcement of an agreement only becomes an issue when there is some form of non-compliance with that agreement. When a party wishes to enforce the agreement it would be, at least inter alia, because it believes the agreement is applicable to the party who is in breach thereof. Therefore a “dispute about the application of a collective agreement” (section 24(1) of the Act) applies to the situation where there is non-compliance with a collective agreement and one of the parties wishes to enforce its terms. Consequently, the CCMA, and not the Labour Court, should entertain disputes arising from the non-compliance with collective agreements.”

Application of the legal principles

- [24] The applicant asserted that he was only under a duty to work 13 to 20 hours overtime per week to qualify for the payment of the allowance. He does not say that he had in fact worked his maximum of 20 hours per week during May 2016 and, therefore, was entitled to the May allowance. If the applicant did in fact work his maximum time of 20 hours overtime per week in May 2016; then it begs the questions: why did he not point this out to the respondent when he was given that opportunity during

the several written communication to him or why did he not assert this in his *statement of case* and/or his *reply*?

- [25] This also does not feature in his referral form. He surely was aware that this was the reason why the respondent had made the deduction. His conspicuous silence on this critical issue compels me to conclude that the probabilities are that he had in fact not worked his maximum 20 hours per week in May 2016 and therefore he had been unjustifiably enriched when the respondent had erroneously paid him on the misunderstanding that he had in fact worked his scheduled overtime slots on 3 and 6 May 2016.
- [26] Based on the evidence before me, the probabilities are that the respondent had communicated in advance the scheduling the applicant's overtime. I am at a loss to understand why the applicant did not protest and/or otherwise query the allocation of his over time if he was indeed scheduled to work more than the maximum 20 hours' overtime per week.
- [27] The applicant is a medical doctor and a professional. In the light of the evidence before me, the probabilities are that the applicant's non-appearance at work for his scheduled overtime on 3 and 6 May 2016 had nothing to do with allegedly being scheduled to work more than the maximum 20 hours during that week. This was at the beginning of the month. He continued to work his scheduled overtime during May without any protest and explanation about his non-appearance on 3 and 6 May 2016.
- [28] The parties were not in dispute about the interpretation of the resolution. On the contrary, they appear to be of the same mind on its interpretation. It is common cause that the applicant is entitled to a fixed monthly allowance for *commuted* overtime for August 2016 for overtime *actually* worked. It is also common cause that he was paid his August 2016 allowance. This is also clearly reflected in his August 2016 salary advice.
- [29] The dispute is one of *application*. The issue arises whether the respondent was justified in making the deduction, as it did, in August 2016 for overtime not *actually* performed on the scheduled dates of 3 and 6 May 2016. I am required to determine whether the applicant had received his commuted allowance for May 2016 in compliance with the resolution, read with his performance contract.
- [30] I have made the findings, above, that the applicant had, probably, not worked more than the maximum 20 hours during May 2016. He fell short of this maximum when he did not pitch up on 3 and 6 May 2016. Hence, the applicant was unjustifiably enriched when the respondent erroneously paid him his full allowance for May 2016. When the respondent had deducted the erroneous overpayment, it had in fact brought the May 2016 allowance in par with what the applicant was entitled to. Hence, the

applicant was correctly paid his commuted overtime allowance (less the deduction) for May 2016 and this was in compliance with the resolution, read with the applicant's performance contract.

AWARD

- [31] The respondent, the Gauteng Department of Health, was under a duty, in terms of the provisions of section VII, clause 8 of PSCBC resolution 3 of 1999 ("**the resolution**") to pay the applicant a *commuted* overtime allowance for overtime actually worked during May and August 2016.
- [32] The respondent had paid the applicant his *commuted* overtime allowance, in compliance with the resolution, for the periods May and August 2016.
- [33] The deduction of R14 259.79, made by the respondent from the applicant's August 2016 salary, was not an irregularity in breach of the resolution.



Panelist: M Naidoo