IN THE PUBLIC SERVICE BARGAINING COORDINATING BARAGAINING COUCNIL

CASE NO: PSCB289-12/13

AWARD DATE: 31 MARCH 2014

In the matter between;

PSA obo MYEZA and 3 OTHERS **APPLICANTS**

AND

DEPARTMENT OF EDUCATION **RESPONDENT**

DETAILS OF THE ARBITRATION AND REPRESENTATION

1 The arbitration was scheduled for hearing on the 6 February 2014 at Durban Teacher's Centre, Clayton Road, Durban.

2 Mr Sihle Hlongwane, a union official, from PSA represented the applicants in this matter.

3 Mr Moodley, from Employee Relations, represented the respondent.

SURVEY OF THE EVIDENCE AND ARGUMENT

4. At the commencement of the arbitration, the parties agreed the following facts as common cause**:**

4.1.1 The applicants were employed as security guards at the time of the dispute at Kwamakutha Comprehensive High School, under the supervision of Principal Mngidi.

4.1.2 The dispute arose on 30 July 2012.

4.1.3 The applicants' claim against the respondents was that they required payment in relation to overtime worked during the period from 1 July 2007 through to 3 May 2011.

4.1.4 The applicants were employed before the Collective Agreement, Resolution 1 / 2007, at pages 84 through to page 100 of Exhibit A.

4.1.5 In 2008, the working hours was formalized to 2-day shifts and 2-night shifts, followed by 4 days off. Before 2008, in 2007, the hours were not formalized.

4.1.6 From 2007 to 2010, the applicants were paid in terms of the Public Service Act, which set out that they would be paid in terms of the Basic Conditions of Employment Act.

4.1.7 Before 2007, it was a practice that all public service employees were given time off in lieu of overtime worked. In exceptional circumstances, management applied for permission and, if granted, permitted the payment of overtime.

4.1.8 The Resolution came into effect on 1 July 2007.

4.1.9 The applicants contend that the respondent was in breach of clause 9 of the Resolution and that the applicants should be remunerated for the overtime they worked, being hours the hours worked over the limit set out in terms of the BCEA.

4.1.10 The duty rosters as set out at pages 1 to 83 of Exhibit A are what they purport to be. In terms of these rosters, the applicants did work hours exceeding the limits permitted in the BCEA and these extra hours were set out at page 83.

4.1.11 The respondent gave the applicants time off for the days worked and they also received their monthly salary.

4.1.12 The respondent regularized the working hours in 2010. The respondent acknowledged that that they were in breach which was then remedied.

4.1.13 In 2010, the applicants did not have an impression that they had been working overtime.

4.1.14 In 2012, the applicants believed that they were working overtime.

5. Pillay added that there was no authority for the conversion of the hours worked to overtime post facto.

6. The parties agreed to make written submissions on the issue of the relief sought.
7. On behalf of the applicant's, Hlongwane made the following submissions, an dI quote verbatim:
   7.1 "*The present disputes pertain to the interpretation and application of a collective agreement as contemplated in section 24(2), 24(5) of the Labour Relations act , the first point of departure is section 23 of the Labour relations act which envisages the primacy of collective bargaining as well as the force of the agreements concluded in terms of that process.*
   7.2 *The collective agreement for which relief is sought in the present dispute is resolution 1 of 2007 and the specific items being item 9.1, 9.2, 9.6 and 9.7 and the said collective agreement and clauses were presented to the commissioner on the applicant's bundle and see page 92 of the said paginated bundle.*
   7.3 *The said collective agreement is very clear that as from the date of it coming into operation to wit 1/07/2007 no employee will be given time off in lieu of overtime worked, this item is peremptory and does not confer any discretion on either the employer or employee as it extend the scope of the basic conditions of employment.*
   7.4 *It has not been disputed that the said applicants worked overtime exceeding a minimum of 40 hours per week as set down in the BCEA of 1997 and the schedule of their time sheets, which were confirmed and signed by the principal of the school.*
   7.5 *The employer contends that the time off that was granted was a form of compensation for the over time worked, we submit as the documentary evidence will show that the hours that the applicants worked did manifest themselves to overtime as conceded into by the representative of the respondent.*
   7.6 *It is trite law that in terms of the interpretation and application dispute the arbitrator must look at the collective agreement and accord the necessary interpretation and thereafter look at the facts and strike a balance as to whether the facts are in line with what the collective agreement purports in a nut shell check as to whether the parties*

have applied the correct interpretation to the facts and this issue is an evidentiary issue since one has to look at the facts leading to the dispute.

7.7 *The relief that the arbitrator may give is a declaration as to the proper interpretation of the collective agreement and then accord the interpretation to the facts, irrespective in whose favor the interpretation of the collective agreement should favor.*

7.8 *The respondent had argued in that the true nature of the dispute must be looked at in terms of the true dispute where he relied on the case of* ***Minister of Safety and Security v Safety and Security Sectoral Bargaining Council and Others (PA2/09) [2010] ZALAC 6; (2010) 31 ILJ 1813 (LAC) ; [2010] 6 BLLR 594 (LAC) (29 January 2010) ,*** *however I submit that my learned colleague is correct in relying on this case and we are not opposing the rationale of the decision of the appeal court however our submission is that the decision supra is not applicable as it is not the contention of the applicants that the decision not to pay them overtime amounts to unfair conduct.*

7.9 *The SSSBC decision is applicable where the applicant in a dispute seeks to have an application and interpretation dispute where he argues the otherwise fairness or unfairness of the decision of the respondent, which presently is not the case.*

7.10 *The applicants are simply saying that we have worked overtime when the collective agreement came into effect and according to the said collective agreement we should be paid, that is the first leg of the dispute as contended by the applicants and in response to that the respondent argues that indeed overtime was worked but however you were given time of and now this calls upon the commissioner to examine as to whether what does the collective agreement say to this effect which manifests itself as the very focal point which determine whether the dispute will fall or succeed*

7.11 *Once the collective agreement has been achieved through the bargaining process accepted at the proper bargaining forum the parties are bound to that collective agreement and are so bound irrespective as to whether who will benefit or who will prejudiced in terms of the collective agreement and the collective agreement can only be impeached if it is manifestly unconstitutional or what it purports is contra bona mores which will also inform the constitutionality thereof.*

7.12 *The submission submitted on [12] is based on a decided case PSA* ***obo Liebenberg v Department of Defence and Others (C 938/2011) [2012] ZALCCT 47;***

(2013) 34 ILJ 1769 (LC); [2013] 8 BLLR 804 (LC) (30 November 2012) where *the judge quipped in the following*

" The PSA has submitted that the dictum in SSSBC should be narrowly construed so as to avoid the situation where most disputes concerning the application of a collective agreement are rendered nugatory. It submitted that the clear purpose of section 24 is to resolve disputes where a party is in breach of a collective agreement by failing to apply its terms, either correctly or at all. Even though the union would be limited to a finding by the arbitrator that the Department had breached (or failed to apply) the collective agreement and a declaratory order that the Department should comply or rectify its non-application, that should not deprive the Bargaining Council of jurisdiction altogether.

This line of argument appears to me to be consistent with the approach of the Constitutional Court in Gcaba v Minister for Safety & Security.[15] The Constitutional Court pointed out that what ultimately determined the jurisdictional divide was the manner in which the dispute was pleaded (i.e. the cause of action relied upon) and the nature of the relief sought. Jurisdiction is determined on the basis of the pleadings, as the Constitutional Court held in Chirwa[16], and not the substantive merits of the case"

From the above it is clear that the decision in which the respondent relies upon does not hold in terms of stare decisis and the facts at hand furthermore it indicates that the commissioner has the jurisdiction to call upon the respondent to comply with collective agreement and or rectify the effects of none compliance which in casu is the relief that was sought by the applicants.

7.13 To further jettison the submission of the respondent one could almost believe that the respondent on his submission was contending that the bargaining council had no jurisdiction however on the dispute itself he does not advance any assertions or submission to resist the dispute however as was observed by the learned judge in the case of ***Department of the Premier, Western Cape v Plaatjies NO and Others (C 515/2011) [2013] ZALCCT 8; [2013] 7 BLLR 668 (LC) (11 April 2013****) where the judge remarked as follows* ***As this Court recently found in an analogous case[10], the arbitrator had no jurisdiction to deal with any unintended consequences of***

the agreement. In Strauss, I referred to this dictum in IMATU v SALGBC & others[11]:

"An elementary tenet of collective bargaining is that the constituency is bound by the bargain, good or bad, that its representatives make on its behalf. ... The bargain, however, stands, unless it is manifestly unconstitutional, a submission not made in these proceedings.

7.15 *It is our submission therefore that the commissioner make a declaration to the effects of the interpretation of the collective agreement and whether the respondent has applied the collective agreement accordingly and if not an order compelling the respondent to comply and or to do right regarding previous omissions to comply with the collective agreement"*

9. In turn the respondent made the following submissions:

9.1 "*The question that the commissioner has to consider is - what is the true issue in dispute?*

9.2 It is submitted by the respondent that the issue that the commissioner has to consider is whether the dispute concerns overtime worked by the employees or whether it is the arrangement of the working hours that fell outside the collective agreement.

9.3 It is submitted that it is only the arrangement of the working hours of the employee is in dispute.

9.4 The hours of work was corrected by the supervisor when it came to his attention and the employees informed accordingly. The hours of work were accordingly adjusted in line with the collective agreement, in consultation with the affected employees.

9.5 The employees at that stage did not form in their mind the impression that they were working overtime or have an expectation of overtime pay.

9.6 The employee may be entitled to claim compensation, if it could be proved that the employer acted in bad faith by knowing that the employees should not work the shifts they worked, but this no relief under a referral of interpretation and application of a collective agreement.

9.7 The issue here is that the employee feels aggrieved that they had to work what they perceived to be extra hours and seeks compensation in the form of overtime. This however cannot be crafted as overtime.

9.8 The question them arises as to whether this is the correct forum or correct referral for such a matter. Solatium or damages is not a competent relief under and interpretation and application of collective agreement dispute.

9.9 The desire to seek the conversion of their being aggrieved to compensation in the form of overtime is devious, if not misplaced.

9.10 The only declarator the commissioner can grant in these circumstances is the regulation of the employees working times and this has already been done by the employer.

9.11 Any other declarator such as to equate the arrangement of work to overtime would constitute the commissioner overstepping her powers and subjected to review.

9.12 A ruling suggesting that the hours worked constituted overtime would not stand the test of reasonableness and procedural fairness.

9.13 It would not be reasonable in that the shifts worked were four days 12 hour shifts and four days off. They ought to have worked in terms of the collective agreement 8 hour shifts for five days with two days off. In converting the time to overtime would constitute unjust enrichment as the employees were granted two paid days leave.

9.14 The employees earn a salary. Irrespective of the number of days in the months they are paid the same salary. The arrangement they had with the supervisor was regarding the arrangement of their working time ie. Four days working and four days off, rather than office workers who worked Monday to Friday with Saturday and Sunday off. These are security guards, who are expected to work night shifts and weekends wherein they were paid allowances.

9.15 It is inappropriate for the employees to claim overtime for all the hours worked as 9.6 and 9.7 of the collective agreement talks of Sunday pay and Public Holiday pay at a different scale (page 92). It is indeed strange that he employees do no claim this. It is submitted

that reasons for not doing this is because they were paid their allowances for the shift work, and now claim all excess hours overtime, including these hours.

9.16 Procedural fairness – the necessary procedures and authority for overtime were neither sought nor followed and neither did the employee at that stage form in his mind an impression that he was working overtime and expected remuneration. Page 104 of the bundle, clauses 10, 11, 12, 13, 14 and 15 are the internal procedures of the employer, effective as of 1 July 2014 (clause 15). These procedures cannot be disregarded in evaluating whether the employees did indeed work overtime.

9.17 Commissioners cannot extend their scope with regard to interpretation and application of collective agreement grant damages in the form of overtime. This would clearly be an issue of the commissioner overstepping her powers.

9.18 In order to grant damages the commissioner needs to consider the issue of willfulness and fault. It is not suggested that the parties knew at that stage that hours worked were outside the collective agreement.

9.19 The employees earn a salary. Irrespective of the number of days in the months they are paid the same salary. The arrangement they had with the supervisor was regarding the arrangement of their working time ie. Four days working and four days off, rather than five days working and two days off.

9.20 It is disingenuous to suggest that it is only the employers liability that the collective agreement was not brought to the attention of the employees. The union shares collective blame. A perusal of the collective agreement shows that the agreement brought a strike to an end, signed by PSA (page 96). A collective agreement is an agreement entered into between the employer and the union representing the employees. The Union had a responsibility in bringing this agreement to the attention of the employees. It is disingenuous to suggest the employer acted in bad faith whilst it is this very union that had a responsibility of consulting and informing their members up the point of their signature and thereafter.

9.21 It is at this point I turn to the issue of timeframes. When the employer discovered that it was in contravention of the hours of working time, it took immediate steps to correct it in 2010. The only breach of the collective agreement was the issue of working times which was remedied. That means that the employees did not know from 2010 to 2011 that they worked "overtime". They woke up one day in 2011 from their stupor and found out that they had worked overtime and here we sit. It is submitted that the conduct of the employees suggest a get rich quick scheme. They do not take into account that they were earning a salary and enjoyed additional days in paid leisure, over other employees, working shorter shifts. The employees are not hourly paid workers and in earning a salary it is unjust enrichment on their part to retain pay for days they had at leisure and still claim overtime. Further to this, the employees were paid their allowances for night shift, public holidays and Sunday pay. If they were not, they would have surely made it part of the dispute.

9.22 The formulae of dividing the days by 160 (pages 1-82) cannot be used as the number of days in a month differ, but their salary remains constant. It may be an argument if they were hourly paid, but this is not the case.

9.23 The Basic Conditions of Employment Act, Chapter 2, 10(1)(a) states "subject to this Chapter , an employer may not permit or require an employee to work overtime except in accordance with an agreement, (b) more than 10 hours a week" (1A) states "An agreement in terms of sub section (1) may not require or permit an employee to work more than 12 hours on any day."

9.24 It is common cause that both parties did not know of the collective agreement, PSCBC, Resolution 1 of 2007 at that time. Therefore in terms of 10(1)(a), the agreement can not be retrospectively applied to the conversion of their arrangement of work into overtime. The collective agreement therefore has no application to their situation, as it was not a consideration in their minds.

9.25 It is submitted that that the employees should fail in quest for overtime pay, as they have not proved that they had worked overtime."

ANALYSIS OF THE ARGUMENT

10. I am required to interpret the collective agreement, Resolution No 1 of 2007, being the Agreement on Improvement in Salaries and Other Conditions of Service for the Financial Years 2007/2008 to 2010/2011.

11. The relevant clauses to be interpreted were 9.1, 9,2, 9.6 and 9.7. These clauses related to the rate of overtime payment and how overtime should be calculated for Sunday and Public Holidays.

12. More specifically, clause 9.7 stated that

> **"*the rate of payment for an employee who ordinarily works on a public holiday shall be 2 x basic salary, without the option of granting time off*"**.

13. The dispute before me is whether the respondent has breached the aforementioned clauses of the Resolution in that it ought to have paid the applicants for overtime worked. This dispute is one that would fall within the scope of an interpretation and application dispute and the Council (and arbitrator) does have the jurisdiction to entertain this dispute.

14. The respondent is incorrect in defining this claim as one of solatium. What the applicants seek is the payment of money for time worked over normal hours as set out in the Resolution. Clause 9 of the Resolution defines overtime as similarly as the definition in the Basic Conditions of Employment Act No 1997.

15. With respect, the applicants' claim is not one of damages, rather for payments they believe they are entitled to in terms of clause 9.

16. Neither party can dispute that the Resolution came into effect from 1 July 2007 and thus all overtime payments had to be made in compliance with the provisions of the resolution (clause 15 of the Resolution).

17. The applicants in this matter, sought payment in relation to overtime worked during the period from 1 July 2007 through to 3 May 2011. The respondent had regularized the working hours in 2010 when the principal, Mngidi, had become aware that he was acting in breach of the Resolution. The respondent then remedied the breach.

15. It would appear that both the parties had operated under an ignorance of the requirements of the collective agreement. It also cannot be disputed that these applicants had actually given time off in lieu of payment during this period. In fact, it would also appear that, as security guards, an inherent job requirement was to work hours that were not normal. It would seem that it had become an implied term of their contract with the respondent that they would be granted time off instead of overtime remuneration.

18. On a strict interpretation of the Collective Agreement, the provisions are prescriptive and that there is no option of the respondent granting time-off. It cannot be disputed that the respondent had been in breach of the Resolution at this time.

20. It is noteworthy that I am obliged to give effect to the principles enshrined in the Labour Relations Act, namely the principles of fairness and equity. Thus, the enquiry cannot end at the question of whether the respondent was in breach of clause 9? An investigation must continue into whether the applicants had been compensated for their overtime work at all? And the answer to that is a resounding yes.

21. It would be grossly unfair to insist that the respondent now pay the applicants for overtime when it had actually been rewarded for such, with time off.

22. The applicants had been treated fairly, whilst not strictly in terms of the Resolution. They had not been prejudiced by the alternative arrangement and to now seek a payment in addition to the time-off given, would be inequitable.

AWARD

23. The respondent is directed, forthwith, if it has not done so already, to ensure it complies with the provisions of clause 9 in regard to the applicants' payment of overtime;

23. The applicants are not entitled to any overtime remuneration.

KAREN CHARLES

PANELIST