REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C244/14

In the matter between:

SHARON STEENKAMP Applicant

and

SANLAM LIMITED Respondent

Date heard: 29 January 2015

Delivered: 22 April 2015

JUDGMENT

RABKIN-NAICKER J

[1] The applicant seeks orders in the following terms:

> "That it be declared that the term standby work as envisaged by Annexure "F3" to the founding affidavit, is synonymous with the term "overtime work" as defined by the Basic Conditions of Employment Act 75 of 1997.
>
> That it be declared that the applicant is not obliged to attend to any standby and/or overtime work in excess of 10 hours per week words long as her remuneration is less than the amount prescribed by the

relevant regulations in respect of sections 10 and 17 of the Basic Conditions of Employment Act 75 of 1997, from time to time.

That it be declared that the applicant is not obliged to attend to any standby and/or overtime work between the hours of 18.00 and 06.00 (the following day) for as long as her remuneration is less than the amount prescribed by the relevant regulations in respect of sections 10 and 17 of the Basic Conditions of Employment Act of 1997, from time to time.

That it be declared that the employment contract concluded between the applicant and the respondent, a copy of which is annexed to the founding affidavit as annexure " F1" and "F2" (hearing after quote the employment contract") is not to be construed as obliging the applicant to attend to any standby and walk overtime work in excess of 10 hours per week and/or to attend to any work between the hours of 18:00 and 06:00 the following day.

That it be declared that the respondents instruction to the applicant to attend to standby and/or overtime work during the period 19 March 2014 to 26 March 2014 constitutes a contravention of the Basic Conditions of Employment Act 75 of 1997.

That the respondent be ordered to pay the applicant the amount of R28,177.50 in respect of the aforesaid period of overtime/standby work.

That in the alternative ……, the respondent be ordered to remunerate the applicant for the aforesaid period by payment equal to one and a half times the pro rata salary for 130 hours."

[2] Annexure "F3" is a letter to information service help desk consultants, of whom applicant is one, informing them that from 1 September 2012 the respondent will be implementing compulsory "stand by work (overtime work) as stipulated in the contract of employment". The stand-by work consists of being on call from 16.30 to 07.00 for a week at a time, on a rotational basis once in a two month period, for which employees are paid for 13 hours. The respondent avers that the applicant and other call desk consultants are never

called upon to work more than 10 hours overtime during their standby periods and the work is limited to dealing with calls when emergencies arise outside working hours. They further deny that the standby arrangements constitute overtime in terms of the BCEA.

[3] The application was initially brought on an urgent basis and sought interim relief pending the determination of the declaratory relief, i.e. that the respondent be interdicted from instructing the applicant from attending to standby work. For whatever reason, the matter was not set down on an urgent basis. The applicant claims in her founding affidavit that the application is brought in terms of section 158(1)(a)(i) to (iv) of the LRA i.e. the following provisions:

> "158 Powers of Labour Court
>
> (1) The Labour Court may-
>
> (a) make any appropriate order, including-
>
> (i) the grant of urgent interim relief;
>
> (ii) an interdict;
>
> (iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act;
>
> (iv) a declaratory order;.."

[4] No reliance is placed in the pleadings on any particular section of the BCEA which would vest this court with jurisdiction to determine the application. In other words no attempt was made by the applicant to enquire into what matters this court has jurisdiction to make declaratory orders about. Despite this omission I will entertain the matter on the basis as set out in the matter of **Fourie v Stanford Driving School & 34 Related Cases**[1] in which my brother Van Niekerk J stated as follows:

> "[7] That issue aside for the moment, the question that arises in each of the applications before me is whether the BCEA entitles an

[1] (2011) 32 ILJ 914 (LC)

aggrieved party to enforce the provisions of the Act as contractual terms, and to rely on the concurrent jurisdiction that this court enjoys under s 77 of the BCEA to enforce them. The starting-point is s 4 of the Act which provides, with some exceptions, that a basic condition of employment constitutes a term of any contract of employment. A 'basic condition of employment' is defined in s 1 to mean 'a provision of this Act or sectoral determination that stipulates a minimum term or condition of employment'. In Bartmann & another t/a Khaya Ibhubesi v De Lange & another (2009) 30 ILJ 2701 (LC), Todd AJ expressed his reservations about whether it could be said that an obligation under the BCEA to furnish certificates, information regarding remuneration and the like could be said to constitute basic conditions of employment (at para 38 of the judgment). For the purposes of these proceedings, I am prepared to accept that they are, and that they may be enforced as contractual terms. I deal with this issue below; in the context of the prayer for costs on a punitive scale that accompanies virtually every application before me.

[8] Insofar as the question of jurisdiction to entertain contractual claims that arise out of a basic condition of employment is concerned, s 77 of the BCEA reads as follows:

'(1) Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act, except in respect of an offence specified in sections 43, 44, 46, 48, 90 and 92.

(2) The Labour Court may review the performance or purported performance of any function provided for in this Act or any act or omission of any person in terms of this Act on any grounds that are permissible in law.

(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract. A

(4) 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.

(5) If proceedings concerning any matter contemplated in terms of subsection (1) are instituted in a court that does not have jurisdiction in

respect of that matter, that court may at any stage during proceedings refer that matter to the Labour Court.'

[9] Also relevant is s 77A(e), which empowers this court to make any appropriate order, including an order 'making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3), which determination may include an order for specific performance, an award of damages or an award of compensation'.

[10] In general terms, it is clear therefore that the BCEA establishes dual enforcement mechanisms - an employee can elect to refer a complaint to the labour inspectorate, or seek to enforce a basic condition of employment in a civil court or in this court as a term of the employment contract. This general rule is subject to the limitations imposed by s 70 of the BCEA on the issuing of compliance orders by labour inspectors, some of which would preclude an aggrieved employee from seeking to enforce a basic condition of employment through the monitoring and enforcement mechanisms established by part A of chapter 10 of the Act. Thus, an employee who is employed in any one of the categories listed in s 6(1) (for example, a senior managerial employee) may not seek a compliance order, nor may any person whose monetary claim has been payable for longer than 12 months (see s 70(d)). In these circumstances, the employee only has the remedy of a contractual claim. Section 74 of the Act contemplates the consolidation of proceedings where an employee institutes proceedings related to an unfair dismissal in this court, the CCMA or a bargaining council with jurisdiction. In this event, this court or the arbitrator, as the case may be, may also determine any claim for an amount owing in terms of the BCEA, subject to the conditions set out in s 74(2)(a) to (c).”

[5] The contract of employment relied on by the applicant comprises of two documents. The first is the contract she signed in 2009 in which she agreed to work official office hours from 08.30 to 16.45 (the main contract), and the second which she seeks to be read together with the main contract, is a letter

dated 8 November 2010 in which the company confirms the change to her working hours from 7.5 hours per day to 4 hours per day, granted on her request, with the proviso that should future operational needs of the department increase it will be requested of her to return to full day work. The letter states that since her job grade does not change, the rest of her conditions of service remain unchanged. These conditions of service in the main contract (Clause 13 thereof) include that:

> "The company reserves the right to expect you to work overtime as circumstances may demand. Your signing of this letter of appointment will indicate your agreement to this condition. Please note that overtime will be paid in accordance with the company's policy, as well as the Basic Conditions of Employment Act."

[6] The founding affidavit reveals that each and every time the applicant took up the issue of the standby duties with her employer, the respondent replied by relying on the contract of employment and in particular clause 13 thereof, and stated that the standby duty was overtime consistent with both the contract of employment and the BCEA. In the answering affidavit however, the company's case is that being on standby for seven days every two months does not constitute work and is not therefore overtime; rather if the applicant is called upon to actually work whilst on standby that such work is overtime.

[7] The respondent also avers in its answering affidavit that it pays for the maximum amount of overtime an employee is required to work in terms of the BCEA , irrespective as to whether any of its staff on standby ever actually work any overtime or a limited duration of time. On that basis it contends that the respondent's conditions of employment and remuneration are far better than that prescribed by the BCEA. The respondent points out in addition, that an employee on standby is only ever called upon in emergency situations; this is infrequent and if required of an extremely limited nature. Secondly the actual nature any work required to be done, if called upon whilst on standby, is extremely limited both in nature and duration. It usually would only require of the applicant to simply escalate any internal IT problem to the so-called "incident manager" if it was a significant IT problem or, if not, assist staff with minor internal problems such as resetting passwords when staff members are

not able to gain access to the network. A copy of the schedule report prepared by the applicant for her March 19-25 2014 standby duties supports this proposition. It reflects that she worked approximately two and one quarter hours in total over the entire seven day period in question.

[8] In as far as the allegations that the standby duties involve 'night work' as provided for in the BCEA, it is averred by the respondent that section 17 of that statute does not apply in that it is applicable to persons whose work is regularly and consistently performed between 18h00 on one day and 06h00 on the second day. Further, the provisions regarding night work contemplated that an employee renders actual work services at the employer's premises on a regular basis during the night shift hours.

[9] The respondent further submits that to the extent that it can be said that spending 15 minutes attending to an enquiry from home on the cellphone and whilst on standby is night work, then the applicant in any event clearly agreed to work night work and such additional time in terms of her employment contract. It avers that it was clearly an implied term and condition of applicant's employment agreement that the overtime could reasonably be expected to be worked after normal hours and after 18h00. The applicant hads actually performed such limited work on one occasion only i.e. on19 March at 18h10.

[10] In reply, the applicant avers that being on standby constitutes overtime work and/or night work *per se*. The important issue as far as she is concerned is whether she is legally obliged to do standby or not. She challenges the respondent's approach i.e. that it can state on the one hand that the overtime work is only measured against the "actual work done", but on the other hand say that they nevertheless pay their employees for work not done (i.e. purely for being on standby).

[11] Essentially this court has consider whether the claim made for R28,177.50 in respect of standby duties performed in March 2014 is due to the applicant in terms of her employment contract and the BCEA. In order to determine this, and before deciding whether the declaratory orders are called for, it is

necessary to look at the particular facts and circumstances of the applicant's employment.

[12] It is common cause that on her own request applicant works half a day and on her version this has meant that her package has been reduced from an amount of R237 375-00 to R127 086-00. On her previous salary, which applies to her co-workers who also do standby duty, sections 10 and 17 of the BCEA would not apply as their salary exceeds the threshold of application of these sections. However, the employment agreement between the parties, is that despite the reduction in her working hours, agreed to by the company on her request, the rest of her conditions of service remain unchanged including her job grade.

[13] The applicant describes her grateful acceptance of the half a day arrangement and avers: "My terms of employment remained unchanged, save for the fact that my hours changed from 8:00 – 16:30 (8.5 hours with an hour lunch= 7.5 hours paid time) to 8.30 – 12.30 (4 hours with no lunch or tea). I was also to be paid less pro rata."

[14] If regard is had to the main employment contract, and that the applicant's conditions of service remain unchanged including her job grade, it is evident that she enjoys the many benefits and conditions of service associated with being permanently and full-time employed on her job grade. These include car benefit, performance bonus and membership of a particular medical aid which is "compulsory for all permanent full-time Sanlam employees who are not already dependent members of a registered medical aid". Further, it is specifically stated in the letter dated 8 November 2010 regarding the change in her working hours that: "please note that the change in your working hours has been granted in accordance to the current operational needs of the Department, however should future operational needs of the Department increase it will be requested of you to return to full day."

[15] The agreement by the company to reduce the working hours of the applicant while keeping her other conditions of service unchanged, including her job grade and attendant benefits, together with an agreement that should operational needs change her working hours will return to be full-time, does

not sit easily with the applicants reliance on the proposition that because her remuneration working half a day is below the threshold envisaged by the BCEA, making section 10 and 17 of that statute applicable, that she should enjoy the protection of those sections that normally apply to persons earning below the remuneration package of that attached to her job grade. The question is can she be considered as an employee to whom those sections apply.

[16] The agreement to allow the applicant to work a half day in the circumstances described above, is explicitly granted at the discretion of the employer and it further explicitly records that it is subject to the operational requirements of the employer, who if necessary will request her to return to full day. In my view the applicant is *de jure* employed (in terms of the two contracts she relies on) at a job grade and with a remuneration package above the threshold provided for in section 10 and 17 of the BCEA. The fact that she takes home remuneration below that threshold has come about at her own instance.

[17] The applicant cannot expect to retain the package associated with her job grade and at the same time demand to be treated differently from her co-employees doing the same job i.e. to have her proverbial cake and eat it. She makes no averments to the effect that any of the benefits provided for in terms of her conditions of service at that job grade, have been withdrawn pursuant to her request to work fewer hours.

[18] In view of the above, the application and the declaratory orders sought must fail. Despite the tenor of the answering affidavit which evinced a high degree of irritation about the bringing of this application, the respondent did not pursue that costs be paid by the applicant in this matter, even in the event that she be unsuccessful. In the circumstances, I make the following order:

Order:

1. The application is dismissed.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: Grant Marinus Attorneys

Respondent: Adv. S. Walter instructed by Carl Swanepoel Attorneys