IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO: D119/05

In the matter between:

DRS AY BADAT & OTHERS	First Applicant
DR J HURST	Second Applicant
DR J MOODLEY	Third Applicant
and	
THE DEPARTMENT OF HEALTH KZN	Respondent

Date of hearing : 5 April 2011

Date of judgment : 31 August 2011

JUDGMENT

SHAI AJ

Introduction

[1] This matter is brought in terms of Section 77 of the Basic Conditions of Employment (BCEA).[1] It pertains to a claim in terms of which the applicants claim that a commuted overtime for non-clinical work they received was a term and

[1] 75 of 1997.

condition of their employment and that respondent's discontinuance of the said commuted overtime amounted to a unilateral change of their terms and conditions of employment and breach of employment contract. The applicants therefore seek an order in the following terms:

- for the unilateral change to terms and conditions of employment to be declared unlawful;
- for the respondent to be ordered to revert to the terms and conditions to the status *quo* with effect from 1 January 2003 with respect to commuted overtime;
- for the respondent to pay all outstanding amounts in respect of the commuted overtime to the applicants from 1 January 2003 to the finalisation of this matter and interest thereon at the rate of 15,5% ;
- costs and or alternative relief.

[2] The respondent is opposing the claim.

[3] At the beginning of the hearing, the applicants applied for an amendment of paragraph 1 of their statement of claim to read as follows:

1. PARTIES

1.1 The Applicants are:-

1.1.1 First Applicant, Doctor A.Y. Badat, an adult male currently employed as a Hospital Manager at the King George V Jubilee Hospital, 75 Stanley Copley Drive, Sydenham, Durban;

1.1.2 Second Applicant, Doctor J Hurst, an adult female currently employed as a Hospital Manager at Addington Hospital, Erskine Terrace, South Beach, Durban.

1.1.3 Third Applicant, Doctor J. Moodley, an adult male currently employed as a Hospital Manager at Clairwood Hospital, 1 Higginson Highway, Mobeni.

The application was granted.

Further that the applicants' representative applied for the withdrawal of the second applicant's claim as she had settled with the respondent. The application was also granted safe for purposes of determination of costs until the withdrawal of the claim.

Background facts

[4] Prior to being translated into Hospital Managers, the applicants were employed as Chief Medical Superintendents at various hospitals in Kwazulu-Natal. The applicants allege that it was a term and condition of employment that they be paid an allowance called commuted overtime for non-clinical work undertaken. They contend further that the overtime was paid monthly to compensate them for the large volume

of non-clinical work they would need to attend to in their positions as Chief Medical Superintendents. They enjoyed this term and condition for approximately ten years. The applicants allege that they were granted this overtime on the basis that it would be for non-clinical work. This is however denied by the respondent, who contends that:

(i) this was not a term of their contract as it was implied that such an allowance could fall away in as much as:

- it was subject to operational requirements in particular the need for overtime and overall changes in the management structure such that overtime was no longer necessary, alternatively, was required to be limited.

(ii) it was a condition of this payment that overtime be for clinical or medical work and it could not lawfully be granted for administration and managerial work.

[5] Prior to 1 May 1997, this payment was called a professional allowance, and called commuted overtime from 1 May 1997.

[6] The applicants allege further that this payment constituted a fixed monthly payment based on average of 8 hours per week for purposes of non-clinical work, including after hours administration and managerial work.

[7] During or late 2002, the respondent advised that this commuted overtime would be stopped and that in the future, should the applicants wish to obtain any further payments, they would be required to undertake clinical work. The applicants duly objected to this. At the same time, a process was introduced whereby the applicants' posts were to be translated into one of Hospital Managers.

[8] Applicants further allege that on 1 January 2002, the respondent unilaterally directed that the applicants could only work commuted overtime for actual clinical work. The respondent denies this and stated the following:

- Changes to limited commuted overtime strictly to clinical work was necessary after sweeping necessary changes to the management of major hospitals which *inter alia* allowed the appointment of non-medical professionals to head major hospitals necessitated *inter alia* by the chronic shortage of medical personnel in the public health service, and necessity to allow hospital to operate more independently of the provincial department *inter alia* to perform more management functions at hospital level.
- Owing to changes, it would not have been appropriate as a matter of industrial relations to allow medical doctors who headed public hospitals to continue to receive an additional effective bonus on their

salaries while non-medical hospital managers who performed the same function did not.

- The said changes did not occur unilaterally.
- That documents on which commuted overtime had been applied for by the applicant's had always explicitly stated that it should be for clinical work only.

[9] When the changes outlined above were implemented, the applicants referred the matter to the Public Health and Welfare Sectorial Bargaining Council whereupon the arbitrator issued an award to the effect that the said Bargaining Council did not have jurisdiction to deal with the matter on account that such did not constitute an unfair labour practice: provision of benefits.

[10] It is on this basis that the applicant approached this Court in terms of section 77 of the BCEA.

[11] The issues to be decided by the Court are listed as follows:

> "(1) Whether the payment of commuted overtime for non-clinical work was part of the terms and conditions of employment of the applicants.
>
> (2) In the event of the above Honourable Court finding that such payment as aforesaid was a term and condition of the applicants' contracts of employer whether;

(2.1) the respondent unilaterally changed the terms and conditions of the applicants' contracts of employment;

(2.2) Such unilateral change was unlawful, alternatively;

(2.3) the respondent was justified as alleged in paragraph 2.8 herein;

(3) Whether there was consultation between the applicants and the respondent prior to the alleged change to the commuted overtime on the 1st February 2003.

(4) Whether the applicants have tendered their service for overtime.

(5) In the event of the Honourable Court finding that the applicants had tendered their services for overtime, whether;

(5.1) Such overtime had to be applied for, or

(5.2) The respondent was entitled to refuse or limit overtime based on;

(5.2.1) operational requirements in particular, the need for overtime and / or overall changes in management structures;

(5.2.2) overtime being paid for clinical or medical work and not for administrative and managerial work.

(6) What actual amount the applicants are entitled to by way of overtime."

The evidence

[12] Dr. Moodley, the third applicant testified as follows:

[13] He is a retired pensioner having retired on 30 June 2010. At the time of his retirement, he was a hospital manager of Clairwood Hospital. Currently he is re-employed on a contract basis as a Senior Medical Officer in the Maternity Unit of

Osindisweni Hospital. His career started in 1973 as an intern and was first appointed as a Medical Superintendent on 1 April 1987, as a Senior Medical Superintendent in 1990 and as a Chief Medical Superintendent at Clairwood Hospital in 1992. To be appointed to these positions, he needed MBCHB degree or Medical degree and administrative experience. As a Chief Medical Superintendent, he was accountable and responsible for the management of health care and all the supporting roles that the institution (hospital) was supposed to deliver. Accountable to him were heads of divisions, such as nursing, medical, finance and systems.

[14] He testified further that his position of Chief Medical Superintendent was translated into that one of a Hospital Manager in 2003. In his opinion, the duties of Chief Medical Superintendent were the same. In so far as commuted overtime is concerned, it arose as a result of the chronic overtime worked by doctors that was due to shortage of staff. When he joined the respondent in 1973, it was paid as non-pensionable allowance and in 1975 the terminology changed to supplementary remuneration non-pensionable. The principle of the commuted overtime at that stage was if one worked overtime, it was broken into the average number of hours worked and it was made up of four groups, first one being 0 – 4 hours, the second being 4 – 8 hours, the third being 8 to 12 hours and the fourth being 12 to 20 hours.[2]

[15] When this commuted overtime system was formulated, as the Chief Medical Superintendent he was allocated 8 hours, being the average number of hours that a

[2] See page 47 of Index A.

Chief Medical Superintendent worked above the normal hours. In February 2002, the concept of total salary packages came about for Chief Medical Superintendents who now belonged to the Senior Management Service echelon of the Public Service. This introduced the concept of total salary packages for Chief Medical Superintendents. When this happened the commuted overtime was left untouched.

[16] In his view, because the overtime for Chief Medical Superintendent was fixed and it was paid to them, even if they were not on duty either due to vocational leave or sick leave *etcetera*, it was a separate additional to their remuneration. Further, that the overtime was paid for additional duties not for additional clinical duties. He had to apply for the overtime in the form of a separate contract entered with the respondent.

[17] In his opinion, circular No. 62 of 1996 in so far as it refers to Medical/Dental Superintendent and Senior Medical/Dental Superintendent doing large number of overtime and having to furnish brief description of the clinical duties performed concerns only the said categories and does not apply to Chief Medical Superintendents.

[18] While he was receiving commuted overtime as a Chief Medical Superintendent, he applied for commuted overtime for clinical work at Osindisweni Hospital and was paid overtime at the rate of a Senior Medical Superintendent. As a result of the translation from Chief Medical Superintendent to Hospital Manager, he

could not receive commuted overtime which he received as a Chief Medical Superintendent, but could only receive commuted overtime for clinical work at Osindisweni Hospital. He is of the view that he should have continued to receive commuted overtime as Hospital Manager as it was part of his salary. He received this commuted overtime since 1992 and it was stopped in December 2002.

[19] With regard to translation from Chief Medical Officer to Hospital Manager, they (hospital management teams) were invited to a meeting at Addington Hospital. At the meeting, they were informed that as a result of transformation, it will no longer be necessary for the hospital heads to be medically qualified. At the end of the meeting, a lot of questions remained unanswered. They were promised further meetings to explain the transformation process as it affected Medical and Dental personnel.

[20] A further meeting was held in September 2002 with the respondent and Medical and Dental personnel, and Union Officials. At these meetings, they were informed that the new structure will be in place by 1 January 2003 and that commuted overtime will cease. This meeting ended with animosity because the applicants walked out at the manner in which the meeting was conducted, as it was dictatorial in nature. Subsequent to this meeting, he received a letter which offered him the position of a Hospital Manager which amongst others stated the following:

> "The Government Policy requires the Department to embark on the process of transforming and restructuring the managements of hospitals / institutions in preparation for the implementation of a decentralised hospital management. One of the major changes has been the abolishment of positions of medical superintendent, senior medical superintendent and chief medical superintendent posts that manage the hospital and creation of posts of Hospital Manager [at various levels]. The post of Hospital Manager, although having a portion of the job content which is similar to that of the Superintendent posts [various grades], is nonetheless as new position. The post of Chief Medical Superintendent, which you presently occupy, is now obsolete on the establishment. This was explained at a meeting on the 25 April 2002 and more lately at a meeting on 30 September 2002, which you attended together with your Union representative."[3]

[21] Despite what is contained in the aforegoing letter, his job did not change in anyway after 1 January 2003.

[22] He accepted the said translation subject to the fact that he would lodge a dispute over commuted overtime that was no longer part of this salary, which he did and hence these proceedings.

[23] Under cross-examination, he admitted that, in respect of commuted overtime, he had to have a separate agreement with the respondent. In terms of this agreement,

[3] See page 67 of the Index A.

he would accept that he would be automatically excluded from further participation in the dispension in the event of any refusal or hesitation on his part to perform overtime and that the performance thereof would not be of lower standard than the expected medical norm, and would not be entitled to any other form of compensation in respect of overtime. He admitted that this agreement gave him the election to participate or opt out of overtime arrangement, but contends that he would not be able to function as a Chief Medical Superintendent if he were to opt out. He further admitted that, the respondent, based on the prevailing circumstances may decide to discontinue the overtime arrangements but will have to face consequences. There would be nothing wrong with such a decision. Further that he is aware of resolution 9 of 2000 in terms of which compensation for overtime is not applicable to members of Senior Management Services, of which he was a member.

[24] As far as the restructuring that was taking place, he said the Labour Unions were involved in such restructuring and admitted that as a result of the said restructuring the position of Chief Medical Superintendent was abolished but was made to understand that such a position exists elsewhere. He could not comment when it was put to him that because the position of Chief Medical Superintendent was no longer in existence and therefore the allowance that was attached to it could not remain.

[25] He admitted that in terms of the transformation that was taking place, the respondent could place employees who have their positions abolished in the equivalent positions where employees would perform similar although not all duties of the new position but that this should be done with the consultation of the incumbents of the abolished positions. He testified that in their case, they were not given opportunity to make inputs as they were not consulted.

[26] He admitted further that he had signed the contract of a Hospital Manager but did not agree with the forfeiture of commuted overtime. He does not agree with the respondent where the latter contends that the two positions are different because the workload increased substantially and admitted that new functions were added e.g determining policies and budgeting, other functions were extended such as workplace discipline, etc.

[27] For him, to qualify for overtime, he had to conclude an agreement with the Department and only for clinical work. He had applied to have his overtime work at Osindisweni Hospital be continued but it had to be brought in line with the new dispension which required that such work be for clinical work and only to be performed during weekends and he was compensated for clinical work performed in terms of such arrangements.

[28] He further admitted that he got authority to do overtime as above on the basis of Public Service Regulation, 1999 clause D3(b) which provides as follows:

> "A executing authority may in exceptional circumstances, compensate a member of the SMS for overtime if:
> (b) the department has established an unambiquous procedures and criteria on overtime which have been consulted with the relevant personnel....."[4]

[29] With regard to consultation, he confirmed that two meetings were held with the respondent, 19 April 2002 at Addington Hospital and the other one held with the Head of Department in September 2002 at Natalia. He however, could not remember a further meeting held on 20 May 2002 at Albert Luthuli Hospital.

Ahmed Yacoob Badat (First Applicant)

[30] He is currently retired and at the time of retirement, he was a Hospital Manager for King George V Hospital. Before becoming a Hospital Manager, he was a Chief Medical Superintendent.

[31] When the transformation was mooted and that the position of Chief Medical Superintendent would be translated into that of Hospital Manager, his concern was

[4] See Respondent's Bundle "E."

loss of prestige (status) and finance. As Chief Medical Superintendents they were treated as very Senior Management.

[32] As a result of the transformation, the hospitals were now headed by Hospital Managers at varying levels ranging from Hospital Manager Level 11, 12 and some at Level 13, depending on the size of the hospital. The extent of the duties also depended on the size of the hospital.

[33] With regard to commuted overtime, he testified that as a Chief Medical Superintendent, he performed a host of activities, from consents, transfer of patients, finding of an ICU bed, transport services after hours, redirecting of patients etc, that were managed on a 24 hours basis. The decision to take away the overtime which he received as a Chief Medical Superintendent while still performing such duties does not seem to be fair.

[34] However, he could not say with certainty whether the duties that he performed for commuted overtime where clinical or administrative because an issue may have both elements and therefore he said he is unable to differentiate between them.

[35] With the decentralisation resulting from transformation much work was devolved to the hospitals to the extent that even if new posts were created to assist the hospital manager, the latter still had a lot of work.

[36] In so far as the commuted overtime operated, he confirmed the third applicant's evidence. He received the commuted overtime at the time when he was appointed Chief Medical Superintendent at Prince Mshiyeni Hospital until December 2002 when it was stopped by the respondent and at the time he was translated from Chief Medical Superintendent to Hospital Manager. He accepted the changes save for the fact that he wanted the commuted overtime in the form that he received it before the translation.

[37] In so far as consultation is concerned, he testified that he was present at a meeting which the respondent held at Addington Hospital. They were informed about the envisaged changes, e.g. creation of posts etc. They were informed further that the Superintendents, whether Senior or Chief Medial Superintendents, would be translated into Hospital Managers. He could not recall whether commuted overtime was discussed. At the second meeting held at the behest of the applicants, the concerns of Chief Medical Superintendents, e.g. loss of commuted overtime was discussed. The meeting was shabbily handled because they were told that changes as proposed by the respondent would carry on regardless. He also confirmed the meeting of 20 May 2002 at Chief Albert Luthuli and that the issue relating to commuted overtime was one of the issues discussed.

Under cross-examination he testified as follows:

[38] Despite the additions of further duties to the post of Hospital Manager, the posts remained similar. He said the job content was the same but became more scientific in the management thereof but in the end he admitted the positions were different.

[39] He admitted that every time the overtime system changed there was also a need for a new application and that it was up to the respondent whether it is approved or not. It was also up to the respondent whether employees could work overtime or not.

[40] He admitted further that in his position of Hospital Manager he was required to apply for overtime and that the respondent was entitled to change the system of overtime based on operational requirements prevailing at that time. He conceded that commuted overtime was not taken away but the system changed to one where they would do overtime for clinical work and also during weekends. He however, did not apply for the new system because he believed that nothing had changed except the change in names. He admitted that he needed to apply for the said overtime arrangement to qualify for it.

[41] He conceded that with the translation, his salary remained the same at Level 13, and that the overtime cannot be used to supplement or augment basic salary.

Jayashree Desai

[42] She testified on behalf of the respondent that she is employed by the respondent as a Deputy Director, Human Resource. Prior to July 1996, the respondent introduced overtime paid to medically qualified personnel which was called a non-pensionable allowance. It was paid in respect of a 56 hour week, and the doctors had to sign a contract and elect to work a 56 hour week. If they did that they were paid an additional non-pensionable allowance. If an employee worked in access of 56 hours, a claim for those hours had to be completed detailing the hours worked.

[43] After 1996, it was decided nationally to introduce a system of commuted overtime. The implementation meant that there would be no longer claims and that when a contract was signed and the employee had the contract approved, a monthly allowance would be paid in lieu of overtime or in respect of overtime. The system had to be implemented in line with Personnel Circular No 55 of 1996. When it was introduced, it was only paid to medically and dental personnel. The Chief Medical Superintendents received a monthly rate of R3618.08.[5]

[44] The purpose of the commuted overtime was to avoid the need for Medical and Dental staff to maintain records of overtime and the decision was also prompted by the fact that the previous system was cumbersome and open to abuse. This system was modified in 1997. Prior to 1997, the system did not take into account the various

[5] See page 5 of Respondent's Bundle of Legislation and circulars.

notches that existed within a particular rank and after 1 May 1997, the system then recognised this element. Further, that it provided for 4 groups, 1 to 4. Group 1 was allocated 4 hours per week and paid actual hours worked. Group 2 was allocated 5 – 12 hours but payment was based on 8 hours. Group 3 was allocated from 13 to 20 hours a week and the actual hours paid was based on 16 hours.

[45] The system provided that when there is a movement from one work sphere to another or from one rank to another, the personnel will have to complete a new contract because of changed circumstances and that such circumstances could result in the reduction of overtime rate, for example a change from Chief Medical Superintendent to Hospital Manager.[6]

[46] In terms of the policy, overtime should not be used to supplement salaries because it is an allowance and not taken into account in determining a salary and the respondent had the prerogative to increase or to decrease it. In fact Professor Green-Thomson, then Superintendent General did make such changes from time to time and he did so based on departmental policy where it says:

> "An earnest appeal is made to heads of departments to ensure that the issue of overtime is handled with circumspection. Overtime should be authorised only when

[6] See page 16 Respondent's Bundle of Legislation and circulars.

> there is a genuine need and should not be seen as a means to supplement or augment one's basic salary."[7]

[47] The system was reviewed from time to time, for example as it appears in Exhibit "E" page 27 from 1 July 1997. There was also a further adjustment on 1 July 1998.[8]

[48] Generally, Senior Management Services are not paid overtime but there are exceptions as contained in paragraph 28 above.

[49] There was a restructuring that took place in the Department of Health (within respondent). One of them was that Hospital Managers no longer needed to be medically qualified and that people with a whole assortment of qualifications could become Hospital Managers as well and therefore the position of Chief Medical Superintendent was abolished and a new position of Hospital Manager was created. As a result of these changes, a new system of commuted overtime was introduced as per Personnel Circular No 44 of 2002 appearing at page 59 of the respondent's bundle of documents to the following effect:

> "After much discussion it has been decided that because of the scarcity of skills, Hospital Managers who are also qualified doctors, can receive commuted overtime as long as that commuted overtime is for after hours clinical work."

[7] See page 16 of Bundle "E".
[8] See page 33 – 39 of Bundle "E".

[50] She attended the meetings at Addington Hospital and Chief Albert Luthuli Hospital and a further meeting in September 2002 as a human resource official. In these meetings, the new proposed organogram was discussed as well as the new overtime structure.

[51] The commuted overtime the applicants received as Chief Medical Superintendents was for clinical work (see Annexure "F"), where in terms of the contract the services had to be of a medical norm and that the word clinical and medical are interchangeably used. If the applicants were doing administrative work as commuted overtime they should not have been paid.[9]

[52] At the meeting at Addington Hospital, the issue of commuted overtime did arise but was not conclusively resolved. In the second meeting held at Chief Luthuli Hospital, the respondent put its stance that it would allow Hospital Manager who are medically qualified to do overtime provided that it is done during the weekends only and they had to apply to qualify for such overtime.

[53] It is not correct that the respondent took away the said commuted overtime but the respondent had insisted that it be performed in a particular way.

[9] See Annexure "F".

[54] Under cross-examination, she testified that in terms of the policy, the paid overtime did not have to be always worked and this was in reference to group 2 and 3 to which Chief Medical Superintendents belonged. For these groups it could be paid for absences from duty on vacation leave for a period of 30 days or 36 days, dependent on one's years of service. She said that was probably a mistake by Head Office. She further accepted that in this way, it was treated as if it was part of the salary package.

Evaluation

[55] The first issue that the Court is asked to determine is whether the payment of commuted overtime for non-clinical work was part of the terms and conditions of employment of the applicants.

[56] The performance of overtime is regulated by the BCEA. Section 10(1) (a) thereof provides that the performance of such overtime must be as a result of an agreement.

[57] Both applicants conceded that the respondent had the prerogative to regulate the performance of the said overtime. The concessions where based amongst others on the following:

- Public Service Staff Code IV provides that the purpose of remunerated overtime duty is to compensate officers and employees for additional

duties which they perform in specific circumstances in excess of their hours of attendance by order of the head of department. Paragraph 3 titled authorisation provides that:

(a) The authorisation in this part is issued in accordance with the provision of Section 41(e) of the Public Service Act, 1994 and Public Service Regulation G3 (2).

(b) The authority to approve overtime remuneration for duty in excess of prescribed hours of attendance rests with the head of department.

[58] Paragraph 7(b) thereof provides that in order to improve control, the head of department may consider determining beforehand the number of hours overtime duty to be performed each day and, as far as possible, setting production targets and or aims as criteria.

[59] Public Service Regulation, 1999 provides that:

"D1. The minister shall determine rates of compensation for overtime through the collective bargaining process.

D2. An executing authority may compensate employee for overtime work if:

(a) the employee does not belong to the SMS, except in certain cases mentioned in regulation V.D.3.;

(b) the department has a written policy on overtime;

(c) the executing authority has provided written authorisation in advance for the work, and

> (d) except in exceptional circumstances, the monthly compensation for overtime constitutes less than 30 per cent of the employee's monthly salary.
>
> D3 An executing authority may in exceptional cases, compensate a member of SMS for overtime if:
>
> (a) the compensation for overtime constitute 1 per cent or less of the salary bill on the relevant salary level; and
>
> (b) the department has established clear and unambiguious procedures and criteria on overtime which have been consulted with the relevant personnel."

[60] The respondent introduced overtime over the years which according to evidence underwent different name changes. Initially, it was called non-pensionable professional allowance and later called commuted overtime.

[61] In line with the BCEA, the respondent ensured that there was an agreement between it and the personnel. According to evidence, every time there was a change from one rank to another, change from one sphere of work to another or change in the salary of an officer, a new agreement had to be completed and authorised.

[62] Indeed the Revised Dispensation of medical and dental personnel dated 10 April 1997 paragraph 9 thereof says:

> "It will be necessary for all participants in the overtime remuneration dispensation to complete revised performance contracts. Of necessity, when people change from one work sphere to another or from one rank to another, they will have

> to complete a new contract because of changed circumstances. It must be accepted that such changes could result in a reduction in the overtime rate."[10]

[63] Before their translation from the Chief Medical Superintendents to Hospital Managers, both applicants had completed the said performance contract for commuted overtime.

[64] Item C (ii) of the said performance contract provides as follows:

> "I accept that I will be automatically excluded from further participation in the event of any refusal or hesitance on my part to perform overtime. I undertake to ensure that the services rendered during any period of overtime will not be of a lower medical standard than the expected medical norm (my emphasis)"

[65] The said performance agreement makes provision for the head of the clinical department and secondly for the head of the institution to recommend or decline such application for commuted overtime.

[66] Personnel Circular No 62 of 1996 provided for the following:

> "commuted overtime; medical and dental personnel:
> 1. .....

[10] (see page 16 – 18 bundle E).

> 2. .....
> 3. It was mentioned at a meeting of all Medical / Dental Superintendents and Senior Medical / Dental Superintendents on 1 August1996 that the situation could exist in smaller institutions that those who hold the rank of Medical /Dental superintendent could be engaged "in a large amount of clinical duties. In these instances, a letter advising that this instruction exists at your institution as well as a brief description of the clinical duties performed must be submitted to this office" together with the roster for period 1.5.96 – 31.7.96 where after approval will be granted for the payment of the allowance applicable to Principal Medical officer (in the case of a Medical / Dental Superintendent / or chief Medical Officer (in the case of a Senior Medical / Dental Superintendent)."

[67] The applicants have testified that the commuted overtime was meant to cover both administrative and clinical work. The respondent on the other hand led evidence to the effect that this was in fact not the case. The respondent based its argument on what I said in paragraphs 64 and 65, which I now proceed to deal with.

[68] I agree with the respondent that the performance contract and the above circular intended the commuted overtime to be performed for a service of a medical/clinical nature. Indeed the applicants conceded in their evidence that the words medical and clinical could be used interchangeably. Reading through the said circular, I do not see how administrative duties could be read into them. It may well be that the applicants read it so to suite their circumstances and perhaps because of lax supervision they allowed a situation where they read it into the circulars or contracts. For the fact that

they were able to do so does not mean that it is how it was intended. The applicants argued that the above circular was not addressing the situation of the Chief Medical Superintendents. However, it is clear that it is addressed to all medical and dental personnel. It is also clear that the allowance as such was meant for medical and dental personnel and the applicants were receiving it on the basis that they were medical doctors albeit that each category received a specific rate. I cannot see how the other Senior Medical and Senior Dental Superintendents could be expected to do clinical work for commuted overtime while the Chief Medical/Dental Superintendent were allowed to claim for administrative work. I say so because both were also heads of hospitals and doing similar administrative and clinical work albeit on different scale or extend.

[69] Further, that, when one looks at the contract, the recommendation must first be made by a head of the clinical department and then by the head of the institution. This in my view indicates further that the work was supposed to be of a clinical nature. In their evidence, applicants indicated it was difficult at some point to determine whether a service was of administrative or clinical nature, and perhaps the respondent may have paid for such a service on the basis that it consisted of both elements. This does not however, prevent the respondent to demand that commuted overtime should be for clinical duties. Gray areas do not mean that rules do not exist. If the respondent paid because there were both elements, it cannot therefore be said that it was paid for pure administrative service. The reason why it was paid was because the said service

contained a service of clinical nature. In my view, the respondent would have paid because of the clinical element and nothing else.

[70] In the premises, I find that the commuted overtime was intended for service of a clinical nature and that the payment of commuted overtime for non clinical work was not part of the terms and conditions of employment of the applicants.

[71] Even if I had for argument sake concluded that payment for non-clinical work was a term of the conditions of employment of the applicants, the applicants would not succeed for the following reasons:

[72] The performance agreement for commuted overtime had to be read together with Public Service Act and regulations, and circulars. The above instruments give the respondent the power to determine when, how and to what extent commuted overtime should be performed. Both applicants conceded this much. It is clear from the evidence there was major restructuring which resulted in the positions of Chief Medical Superintendent being translated into hospital manager. The respondent as I stated above determined that the hospital managers would not receive commuted overtime because some of them were not medically trained and could not perform commuted overtime for a work of clinical nature. The respondent withdrew the said commuted overtime attached to the former position of Chief Medical Superintendent and introduced commuted overtime to be performed for clinical work and only on

weekends. To qualify, the applicants would have to apply and approval sought from the head of the department. In fact, one of the applicants Dr. Moodly applied and received approval to do that work at Osindisweni Hospital. The applicants conceded as I said above that respondent could change the way overtime is performed and I think this is exactly what the respondent did. It was an express term of their relationship that the respondent would determine how overtime is to be performed. The respondent did just that.

[73] Secondly despite the respondent's power as outlined above when the said changes were mooted, the respondent engaged the applicants. The evidence shows that there were three meetings which were held with the applicants during the consultation stage. It appears that the applicants were not satisfied with the outcome. However, the fact that they were not satisfied does not mean that they were not consulted. As a matter of fact, coming out of the consultation process, the respondent came up with a decision as captured in circular 44 of 2002 to the following effect:

> "After many discussions, it has been decided that, because of the scarcity of skills, Hospital Managers who are qualified doctors can receive commuted overtime as long as this is for after hour's clinical work.
>
> It has been decided that a Hospital Manager at Level 2 can receive commuted overtime up to 16 hours and a Hospital Manager at Level 13 can receive commuted overtime up to 8 hours.
>
> 3. .....

> 4. Doctors applying for positions of Hospital Managers must please be aware that the approval of commuted overtime on the basis describe in paragraph 2 above is not automatic. On promotion or translation to the position, a new application for commuted overtime will have to be made."

[74] Thirdly, the applicants conceded that Labour Unions were involved in this transformation and hence, the changes were done after consultation with them.

[75] Therefore, the contention by applicants that there was no proper consultation cannot stand in light of the above. There was therefore no unilateral change of conditions of employment.

[76] In the circumstance my order is as follows:

1. The claim by the first and second applicant is dismissed.
2. I make no order as to costs.

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SHAI AJ

Appearances

For the Applicant	:	Mr. Kirby-Hirst
Instructed by	:	Macgragor Erasmus Attorneys
For the Respondent	:	Ms. MG de Klerk
Instructed by	:	State Attorneys