SA 07/2002

IN THE SUPREME COURT OF NAMIBIA

In the matter between

THE PUBLIC SERVICE UNION OF NAMIBIA APPELLANT

And

NAMIBIA AIRPORTS COMPANY LIMITED RESPONDENT

CORAM: Strydom, CJ, O'Linn, A.J.A. *et* Chomba, A.J.A.

HEARD ON: 08/10/2002

DELIVERED ON: 05/03/2003

APPEAL JUDGMENT

STRYDOM, CJ: On the 1st June the respondent obtained the following interim order against the appellant, namely:

"1. The applicant's non-compliance with the Rules of this Court in respect of service and filing of papers is condoned.

2. A *Rule nisi* is issued calling on the respondent to show cause, if any, on Monday, 25th June 2001 at 10h00 why an order in the following terms should not be granted:

2.1 Declaring the decision, taken by the respondent as the representative of the employees of the applicant, to the effect that the employees employed by the applicant are not obliged to work overtime, is unlawful, null and void in so far as it relates to those employees whose work is connected with the arrival, departure, provisioning, loading or unloading of aircrafts used for the transportation of passengers and goods at the aerodromes serviced by the applicant;

2.2 Directing that those employees so employed by applicant are obliged to perform the overtime duties as may be required by the applicant;

2.3 Interdicting and restraining the respondent from advising, inciting or counseling applicant's employees so employed to the effect that they are not obliged to perform overtime duties.

2.4 Directing the respondent to pay the costs of the application.

3. It is ordered that paragraphs 2.2. and 2.3 shall operate as an interim order and interdict with immediate effect pending the final determination of this application,."

Manyarara, AJ, confirmed this order on the 12th November 2001. I must point out that the order, initially applied for by the respondent, was wider than that granted and included all the employees and not only those who were connected with the arrival and departure of aircraft and the activities surrounding those instances. The appellant appealed against the order and was represented by Mr. Heathcote. Mr. Miller represented the respondent.

One Anton Francois Theart deposed to an affidavit on behalf of the respondent. According to him the respondent was established in terms of the Airports Company Act, Act 25 of 1998, as a public Company. Its duties were to manage and control the airports set out in a schedule to the Act and included the airports in the present matter. A Project Implementation Team was tasked to compile a personnel handbook and this was done on the 27th April 1998 and approved. In regard to the policy concerning overtime it was stated that the working of overtime was at the discretion of the Management and that it was subject to the restrictions set out in section 30 and 32 of the Labour Act, Act 6 of 1992 (the Act). After incorporation of the respondent, this policy, according to Theart, was slightly amended. As far as is relevant to the present issues, it seems to me that the following sentence was added by the amendment, namely "It is a specific condition of employment that employees undertake to work overtime when required." The revised personnel Handbook was implemented on 1st January 2000 after

the management cadre was informed that all employees should have free access to the handbook and all Supervisors were provided with copies thereof to facilitate such access. See annexure “C”

Theart further set out that by agreement with the Ministry of Works, Transport and Communication, which previously administered and managed airports, all the employees of the Ministry were taken over and they all signed respondent’s offer of employment. The deponent further pointed out that the appellant only became a trade Union, representing the employees of the respondent, on the 17th November 2000 when the Procedural and Recognition Agreement was concluded.

Allegations that the respondent unilaterally changed the conditions of service, relating to “overtime”, were denied by Theart and when the respondent was informed of a possible strike, to commence on 1st June 2001, attempts were made to resolve the dispute. These attempts were unsuccessful. Theart also referred to a consent to work overtime, which was signed by all the employees of the respondent, and denied the allegations made in correspondence that no such agreement was in existence.

In conclusion it was pointed out that a failure by respondent’s members to perform overtime duty would disrupt the services of the respondent and would result in the respondent breaking the international air safety rules. Such action would also result in endangering the lives of persons as well as the property of the respondent and its clients.

The appellant did not file any affidavits in answer to the respondent's application but was content to limit itself to a notice in terms of Rule 6(9)(b)(ii) in which various legal points were taken against the granting of the interim order. The Notice of Appeal, which was filed after leave to appeal was obtained, was against the whole order and/or judgment made by the learned Judge *a quo* on the following grounds:

> "1. The learned judge erred in confirming the rule and more particularly in that:
>
> 1.1 he wrongly interpreted Section 30(2) of the Labour Act, 6 of 1992(hereinafter the "Act"); and/or
>
> 1.2 he held that the employment agreement that was entered into between the parties included a term, in terms of which the Applicant and the Respondent agreed that the Applicant's members would work overtime; and/or
>
> 1.3 he relied on the wrong clause (the clause quoted in the judgement, page 5, does not form part of Annexure "D", being the agreement that was entered into between the parties); and/or
>
> 1.4 he wrongly held that Section 32(5) of the Act is irrelevant to the contractual relationship between the parties, and of

no assistance in interpreting Section 30(2) of the Act; and/or

1.5 he failed to have proper regard and/or wrongly interpreted the phrase “while he/she performs” as contained in Section 30(2) of the Act; and/or

1.6 he wrongly interpreted the word “while” in section 30(2) as to mean that the Respondent “may require particular employees to remain at their respective stations for purpose of performing the work which they are contracted to perform and an agreement to that effect is not necessary; and/or

1.7 he failed to have proper regard to the true meaning of the phrase “subject to the restrictions regarding overtime work” as contained in the employment agreement.”

Bearing in mind the grounds of appeal and the arguments raised before us by Counsel, it seems to me that there are mainly two issues which must be decided namely, the meaning of section 30, and more particularly subsection (2) thereof, read with section 32 of the Act, and any other provisions which may, in context, throw light on the meaning of the provisions, and the meaning and import of the words “subject to the restrictions regarding overtime work” where they appear in the Offer of Employment or subsequent amendments thereof, if any. The relevant sections of the Act provide as follows:

"30(1) No employer shall require or permit an employee to work for a spread-over of more than 12 hours.

(2) The provisions of subsection (1) shall not apply in respect of an employee while he or she performs emergency work or work connected with the arrival, departure, provisioning, loading or unloading of a ship or aircraft used for the transportation of passengers or goods, or the arrival, departure, provisioning, loading or unloading of a truck or other heavy vehicle used for the transportation of passengers, livestock or perishable goods."

The relevant provisions of section 32 of the Act read as follows:

"(1) ….

(2) No employer shall require or permit an employee to work overtime otherwise than in terms of an agreement concluded by him or her with the employee and provided such overtime does not exceed three hours on any day or 10 hours during any week, or, where subsection (4) has been applied, does not exceed the maximum overtime fixed under that subsection.

(3) ….

(4) ….

(5) The provisions of subsection (2) shall not apply in respect of an employee while he or she performs work referred to section 30(2)."

Counsel were not agreed as to the meaning of the exemption and more particularly the words "….while he or she performs… work connected with the arrival, departure, provisioning, loading or unloading of a ship or aircraft used for the transportation of passengers or goods….." Mr. Heathcote, on behalf of the appellant, submitted that the exemption only applied where the persons, performing this work, were busy with the loading or unloading etc. of an aircraft or truck, and in the act of doing so, exceeded

their normal working hours. In that case they must complete the work they are doing and no agreement to do overtime is necessary in such an instance. This interpretation presupposes that they must have started the work during normal working hours and if it is not completed during that time, they can be required, without any agreement to do overtime, to finish that particular job.

Mr. Miller, on the other hand, submitted that the words "…while he or she performs work connected with the arrival etc. … of an aircraft" refer to the type of work, which the worker was contracted to do, and that the exemption applied in general and was not meant to cover only the situation where the worker was busy doing the work and then exceeded the normal working hours. On the interpretation of Mr. Miller such a worker can be required to do the work even though it started only after normal working hours were completed and the exemption was not meant to be only an extension or a continuation to complete a job which was started during normal working hours.

I agree with Mr. Miller that the words used could mean either of these two interpretations. The meaning of the word "while" according to the Oxford Concise Dictionary, p. 1596 is "1. a space of time, time spent in some action …2 … during some other process … 3. during the time that; for as long as." It seems to me that 'a space of time' or 'during the time that' or 'as long as' could equally refer to the time that they are actually doing the work or are required to do that type of work. The only case to which we were referred where the word 'terwyl' (while) was interpreted, was the case of Lourens NO v Colonial Life Assurance Society, 1986 (3) SA 373 (AA). The word was used in an insurance contract in connection with an exemption of risk clause. In this case it was found that the ordinary and general meaning of the word is temporal in

nature. (p.387 B). The word denotes length of time. Various actions relate to time and in order to determine the meaning of the word in a particular instance one would have to look at the context in which it was used.

In various other sections in the Act employers, with employees doing the work referred to in sec. 30(2), are exempted from the restrictions of the particular section. In section 31(1)(a), which deals with meal intervals, and which provides that such employee shall not work for more than five hours continuously without a meal interval, in subsection (4)(a) exempts section 30(2) employees while performing work referred to in that section. That exemption, so it seems to me, can only apply while the employee is actually doing the work and cannot apply in general as that would mean that even when the employee is not so busy he or she is not entitled to a meal interval after five hours work. However, section 33(1) prohibits an employer to require an employee to do work on a Sunday or public holiday. Subsection (2)(a) exempts an employer from the provisions of Subsection (1) in regard to employees performing any work referred to in section 30(2). This exemption is clearly general in nature and unqualified, and not limited to a situation where the employee, during the time that he or she was actually doing the work, continued into a Sunday or Public Holiday. It merely states that the provisions of subsection (1) shall not apply to an employer who employs an employee for purposes of performing any work referred to in section 30(2)

In section 32(2) an employer is prohibited from permitting or requiring an employee to work overtime otherwise than in terms of an agreement concluded with such employee, and such overtime is not to exceed three hours per day or 10 hours during any week. The exemption, set out in section 32(5) is again unqualified and provides that the

prohibition to do overtime, without an agreement to that effect, shall not apply in respect of an employee while he or she performs work referred to in section 30(2). If the exemption is construed in the narrow way, as was suggested by Mr. Heathcote, then it seems to me that its ambit would be limited and its application be left to the uncertainty of whether the activities started during normal working hours or not.

Mr. Miller submitted that it was proper to construe an ambiguous word or phrase in the light of the mischief which the provision is designed to prevent, and to give to it a meaning, which will carry out the objects of the provision. See in this regard Craies on Statute Law: p 85. It seems to me that the overall intention of the Legislator in regard to the type of work, set out in sec. 30(2) of the Act, was to ensure that such work was not hampered by the restrictions imposed by secs. 32, 31 and 33(1) and therefore exempted employers, who employ employees, doing that type of work referred to in section 30(2), from the restrictions. It can be accepted that in doing so the Legislator was aware of international obligations in regard to the loading and off loading, particularly of aircraft, and the safety of passengers and goods and in this regard those involved in these activities were obliged to do the work whether in normal working hours or as part of overtime and notwithstanding the existence of a contract to do overtime as required by the Act.

Mr. Miller further pointed out the uncertainties which would arise if the interpretation, propagated by Mr. Heathcote, was accepted and the ease with which the mischief, which the Legislator wanted to address, could be circumvented. If the section meant that the exemption only applies when an employee overruns normal working hours when busy doing the particular task, many situations may arise which would make the application

of the exemption difficult and would cause uncertainty. Two examples would suffice. An aircraft landed in working hours but for some reason loading or off-loading could only start after normal working hours. Would the exemption apply? Would the exemption apply if the aircraft landed after working hours but the employees were still busy off-loading another aircraft?

Examples abound but what is more, the interpretation submitted by Mr. Heathcote leaves the door open for manipulation by either the employer or the employee, and in order to be safe the employer would have no choice but to enter into agreements for overtime notwithstanding the exemption provided for by section 32(5) read with section 30(2). In certain instances some of the problems may be overcome by employing shift workers, as was submitted by Mr. Heathcote. There is however a general presumption that the Legislator intended to treat all persons, who are subject to an enactment, equally. (See Sekretaris van Binnelandse Inkomste v Lourens Erasmus (Edms) Bpk., 1966 (4) SA 434 (A) at p 443C. Shift workers may be a solution for a big company like the respondent but not for the one truck company and small-business transport contractor.

In either case the exemption would be ineffective and would require, for the sake of certainty, that agreements to do overtime, be entered into. It also seems to me that the exemptions from spread-overs for longer than 12 hours per week and from doing work on a Sunday and public holiday militate against the interpretation propounded by Mr. Heathcote. I fully agree with what was stated by Botha, JA, in Sekretaris van Binnelandse Inkomste v Lourens Erasmus-case, *supra*, at page 443A, namely:

> "Ek meen dat aanvaar moet word dat die Wetgewer nie onsekerheid en verwarring in die toepassing van sy verordeninge wil skep nie, en waar woorde dus vir verskillende betekenisse vatbaar is, moet daardie uitleg wat tot onsekerheid en verwarring by die toepassing van die betrokke wetsbepaling aanleiding gee, vermy word ten gunste van daardie uitleg wat sekerheid meebring."
>
> (I am of the opinion that it must be accepted that the Legislator did not want to create uncertainty and confusion in the application of its enactments, and where words are capable of different meanings, that interpretation which creates uncertainty and confusion in the application of the particular enactment, must be avoided in favour of the interpretation that creates certainty). (My free translation).

Botha, JA, cited, with approval, what was said by Lord Shaw in Shannon Realties Ltd. v Ville de St. Michel, 1924 A.C. 185 at p 192-193, namely:

> "Where alternative constructions are equally open, that alternative is to b e chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working system." (See Sekretaris van Binnelandse Inkomste-case, *supra*, p 443B)

Mr. Heathcote submitted that an interpretation of the words "while he or she performs … work" which is related to the type of contract rather than the time when the work is done, could lead to abuses by the employer. That is of course always a possibility but it seems to me that the Act makes ample provision to ensure the health, safety and welfare of employees at work which can be implemented in such an instance. See Parts XI and XII of the Act.

I am therefore of the opinion that the words "while he or she performs … work connected with the arrival, departure, provisioning, loading or unloading of a ship or aircraft……" refer to and was meant to refer to the type of work the employee was

contractually employed to do and which was connected to one or all of the above activities circumscribed by the Act.

In regard to the agreement that was signed by all workers on 14 January 1998, it seems to me that Mr. Heathcote is reading too much in the words "subject to the restrictions regarding overtime work as set out in Articles 30 and 32 of the Labour Act 6 of 1992." If I understood Theart correctly all the workers were required to sign this document. If that is so then it seems to me that the words were mere surplusage because the respondent could not by any means circumvent or uplift the restrictions imposed by sections 30 and 32 except as laid down by the Act itself. However, Mr. Heathcote himself did not go so far as to say that if such an agreement exists it would set at naught the provisions of sec. 30(2) of the Act. On his interpretation of sec. 30(2), employees, doing the activities referred to in the section, would only run into overtime once they have completed the tasks as envisaged by section 30(2). Put differently, such employees would only need an agreement to do overtime once the loading or unloading of the aircraft was not one continuous operation which had started during normal working hours. I agree with Counsel that the said words "subject to the restrictions regarding overtime work" do not suspend the operation of the exemption set out in sec. 30(2) and for as long as their activity falls within the ambit of the section no agreement would be necessary. It follows therefore that where I have found that the section exempts the employer from entering into an agreement concerning overtime in regard to those workers that are contractually bound to perform the activities set out in the section it must also follow that on this interpretation the workers would still fall within the ambit of the section even though it is not one continuous operation connected to normal

working hours. Consequently the words “subject to the restrictions regarding overtime work” do not have the effect, contended for, by Mr. Heathcote.

In the result the appeal is dismissed with cost.

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STRYDOM, C.J.

I agree,

_____
O’LINN, A.J.A.

I agree,

_____
CHOMBA, A.J.A.

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