

Reportable

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Court of Appeal Civil Case No. 29 of 2005
High Court MISCA (F) 197/99

In the matter between:

BOTSWANA POWER CORPORATION

APPELLANT

and

BIAS MOANENG AND 125 OTHERS

RESPONDENTS

A I S Redding S.C., with him S.C. Vivian
and Attorney B B Tafa for Appellant

J. Peter, with him Attorney O. Moupo for Respondents

J U D G M E N T

Coram : Korsah J. A
Akiwumi J.A
McNally J.A

MCNALLY J.A.

This is a dispute about the effect of section 99 of the Employment Act (Cap 47:01) on the wages or other benefits due to the respondents for working on paid public holidays. The respondents are shift workers. Their wages are paid monthly but are calculated on the number of shifts they work, averaged out over a 12 month period.

Before I set out the relevant sub-sections of section 99, it will be useful to define some of the terms cited.

1. "Paid public holiday." Certain days are listed in the 2nd Schedule to the Act as paid public holidays. In fact all public holidays are treated by the Appellant as paid public holidays, and employees are paid on those days whether or not they work.
2. "Basic pay." This is defined in the Act as meaning "the rate of payment, including any payment in kind, made by an employer for work done or services performed during an hourly, weekly, fortnightly or monthly period excluding all other remuneration".
3. "Wages." This is defined in the Act as meaning "in relation to any contract of employment, the aggregate of basic pay and all other forms of remuneration payable to an employee by an employer by virtue of that contract..." (the rest of the definition is not material).
4. "Rest day." The Act speaks primarily of "rest periods" as in section 93(1) –

"Every employee shall be granted by the employer in every period of seven consecutive days a rest period comprising at least 24

consecutive hours, which period shall ordinarily be or include a Sunday:

Provided that...." (not relevant)

5. Section 94 then provides:-

"Any employee who works during a rest period, either by agreement with the employer or on being required to do so under section 95, shall be paid at least double the wages he would have been paid had the period been an ordinary working period, or at his option be granted a day or days off, as the case may be, in lieu thereof."

It follows that a rest day is a day on which an employee would not normally be expected to work.

I turn then to the disputed sub-sections of section 99.

"99(2) Where a paid public holiday falls on a rest day the day next following the rest day which is not itself a rest day shall be deemed, for the purposes of this section, to be a paid public holiday.

- (3) Any employee who works on a paid public holiday or on a day observed as a public holiday by virtue of the provisions of sub-section (2) shall
- (a) be paid at least double the wages he would have been paid had the day been an ordinary working day;
or
 - (b) be granted a paid day off in lieu of that day within 10 days immediately thereafter.
- (4) Subject to sub-section (3), the employer shall pay to his employee his basic pay in respect of every paid public holiday."

The stated case which was before the Learned Judge in the Court a quo set out the issue to be decided in paragraph 15 as follows:

"This Honourable Court is accordingly called upon to decide on the correct interpretation of the meaning of "at least double" in Section 99(3) (a) and/or clause 9 of the Conditions of Service."

In fact clause 9 of the Conditions of Service does not use the words "at least double" but rather "twice the basic hourly rate" but nothing turns on that. The

more fundamental error, as His Lordship below correctly pointed out, is that the dispute is not about that phrase at all. It is common cause that "at least" means "not less than" and "double" means "twice."

The real point of difference between the parties lies in the interpretation of the phrase in sub section (4) "subject to sub section (3)." This will be apparent when I set out the two opposing contentions. I will refer to the parties as "The Corporation" and "The Workers."

The Corporation contends that when a worker works on a paid public holiday he should be paid double the wages he would have been paid had that day been an ordinary working day. (I refer to the situation under section 99 (3)(a), ignoring for the moment the alternative option under section 99(3)(b).

The workers contend that when a worker works on a paid public holiday he should be paid as above plus, under subsection (4), his basic pay for that day.

It was the workers' contention which found favour with the learned judge a quo and indeed apparently with another Judge, the proceedings before whom were set aside as a nullity for reasons unknown to us.

In the judgment of the learned Judge a quo with which we are concerned the crucial finding which he makes is in relation to the word "subject to." He set out, correctly, that it is an ambiguous phrase. Its usual function is to introduce a subservient provision, and in support of that statement he cites Thompson on Legislative Drafting, 2nd Ed. at p.85; Hickman v. The Attorney General 1980(2) S.A 583 (R) at 587 D; Commissioner of Police v. Wilson 1981(4) S.A 726 (Z A D); S v. Marwane 1982 (3) S.A. 715 (AD); Crook & Another v. Minister of Home Affairs and Another 2000(2) S A 385 (T) at 389; and C & J Clark Ltd v Inland Revenue Comrs [1973] All E R 513 at 520.

For the sake of completeness I should add to this list the cases cited by Mr Redding, all of which adopt what I would call the normal interpretation of the phrase "subject to". This is perhaps best and most recently expressed by Farlam J.A in Premier, Eastern Cape & Another v. Skeleni 2003 (4) S A 369 at 375 H, where he says of the phrase:-

"While it is often used in statutory contexts to establish what is dominant and what is subservient, its meaning in a statutory context is not confined thereto and it frequently means no more than that a qualification or limitation is introduced so that it can be read as meaning "except as curtailed by"

The other cases are:

Alhaji Umaru Abba Tukur v The Government of Gongola State (Nigeria) (1989) 9 NILR 5.

Attorney – General v Mharapara 1986(1) ZLR 19 (SC) at 21 B – C.

Harding v Coburn [1976] 2 NZLR 577 at 582 lines 44 – 46

Environmental Defence Society v. Mangonui County Council [1989]

3 NZLR 257 (C. A) lines 17 – 25.

Massey – Harris Co. v. Strasburg (1941) DLR 620 (Sask. C.A) at 622.

Hawkins v Administrator of South West Africa 1924 SWA 57 at 66.

The learned Judge a quo however then went on to rely on the case of Akisatan Apera of Iporo and Others v. Akinwande Thomas and Others 1950 A C 227 as authority for the use of the words “subject to” to mean “without prejudice to” or “notwithstanding.”

Certainly “without prejudice to” was the interpretation used by Lord Simonds at p234 of the judgment. But equally clearly their Lordships were dealing with a situation in which to give the phrase its normal or ordinary meaning would have made nonsense of the provision under consideration. That is far from the position here. In fact I take the view that to give the words “subject to” this normal meaning makes a great deal more sense than to give them the more

unusual meaning applied by the learned Judge and supported by Mr Peter. To use the words of Megarry J. in Clark's case (supra):-

"The highest compliment that I can pay this argument is that it is ingenious; but it seems to me to be fallacious and unreal."

His Lordship below was much influenced, in reaching his conclusion, by the difference between "basic pay" and "wages", and by the fact that "basic pay" is used in section 99(4) and "wages" in 99(3)(a). I do not find this distinction significant. "Basic pay," as we have seen, is what a worker receives before one considers the extras which may accrue after a day's work – overtime, shift bonus, production bonus etc. "Wages" is "the aggregate of basic pay and all other forms of remuneration."

It follows naturally that in section 99 (3), when the Act is talking of the remuneration of a worker actually working on a paid public holiday, it talks of double his "wages", whereas in 99(4), when dealing with a worker not working on a paid public holiday it talks of his "basic pay." How could he be paid more? He has not worked so as to earn overtime, shift bonus or production bonus. He can be entitled only to his basic pay. The worker who has worked is entitled to his (double) wages. I conclude that the two concepts are obviously different, but the difference is immaterial to this particular argument.

The practical common sense of the Corporation's interpretation may be illustrated by an example. Let us consider the case of three workers-

- A** works on a paid public holiday and is paid double wages.
- B** works on a paid public holiday and is granted a paid day off in lieu of that day.
- C** does not work on that paid public holiday.

Let us assume the days basic pay is P100 and that there are no extras, so that wages are the same as basic pay. Let us take a period of 7 consecutive days, where the shift works Monday to Friday and then has two rest days (as in the example at the top right hand corner of page 36 of the record). Let us finally assume a public holiday on the Tuesday.

- A** will be paid P100 for his work on Monday, Wednesday, Thursday and Friday, and P200 for his work on Tuesday – total P600, and no day off.
- B** will be paid P100 for his work on Monday and Tuesday, will take his day off on Wednesday, but will still be paid P100 for that day, as also for Thursday and Friday – total P500 plus a day off worth P100.
- C** will be paid P100 for his work on Monday, P100 for his paid Public Holiday on Tuesday, and P100 for each of Wednesday, Thursday and Friday – total P500 plus a day off worth P100.

That arrangement seems to me to be fair and equitable, and in conformity with the section if one reads "subject to" to mean "except as curtailed by" in subs (4).

On the other hand, on the workers' interpretation A would earn P700 in the week, B (unless I have missed something in Mr Peter's argument) would earn P500 plus a day off worth P100, and C would earn the same – an arrangement unfair to B and excessively rewarding to A.

Even if I have characterized the result of Mr Peter's argument unfairly, I think there are other reasons for rejecting his interpretation. Given the distinction between "basic pay" an amount paid on a paid public holiday when no work is done and "wages", an amount paid in respect of work done, it is incongruous to pay a combination of basic pay and double wages to someone who has worked on a paid public holiday.

And finally it seems to me to be very unusual to interpret "subject to" to mean "regardless of" or "irrespective of" or "over and above" or "notwithstanding" or "without prejudice to". The only case we have been shown in which this interpretation was applied is the Akisatan Apera of Iporo case, (supra), and there it was an interpretation forced upon the Court because the more natural interpretation led to a nonsensical result. The Akisatan case has been mentioned

only twice in the South African Law Reports, and on neither occasion was its interpretation adopted.

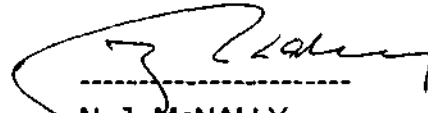
In sub section (4) of Section 99 of the Employment Act [Cap 47:01] I am satisfied that "subject to" bears its normal meaning which in the context in "except as curtailed by". As Mr Redding put it in his replying heads of argument, the case for the respondent really requires the words "without prejudice to subsection (4)" to be inserted in subsection (3). Indeed it seems to me that if one simply deleted the words "subject to subsection (3)" from sub section (4), then the interpretation contended for by Mr Peter would apply. Their inclusion negates his interpretation.

Accordingly:-

The appeal is upheld with costs.

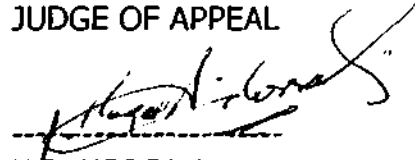
1. The order of the Court a quo is set aside and it is ordered instead that the application is dismissed with costs including the costs reserved on 7 June 2004.
2. Costs of appeal to include the costs of two counsel.

DELIVERED IN OPEN COURT AT LOBATSE ON THE ^{27th} ~~21st~~ DAY OF JULY, 2005.



N. J. McNALLY
JUDGE OF APPEAL

I agree



K.R. KORSAH
JUDGE OF APPEAL

I agree



A. M. AKIWUMI
JUDGE OF APPEAL