IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG) **CASE NO J3128/01**

In the matter between:

THE PROFESSIONAL TRANSPORT WORKERS UNION and others First Applicant

and

MAGNUM SECURITY (PTY) LTD First Respondent

SECURITY SERVICES EMPLOYERS ORGANISATION Second Respondent

JUDGMENT

JAMMY AJ

1. The Applicants in this matter came before this Court pursuant to an Order of Court dated 16th November 2001, the material provision of which reads –

"The matter is referred to oral evidence on whether the employees, who are Applicants, have separately or otherwise entered into an agreement with Magnum prior to 6 March 2001 which entitles them to work a specified

number of hours per week."

2. The Applicants had applied as a matter of urgency for an Order which, as amended subsequent to the Order of Court above referred to, read as follows –

"1 The First Respondent is ordered to restore the terms and conditions of employment of the Second and Further Applicants that pertained prior to 20 March 2001;

2. The First Respondent is ordered to roster the individual Applicants on five 12 hour shifts per week unless otherwise agreed with the individual Applicants and for as long as this is not precluded by law;

ALTERNATIVELY

The First Respondent is ordered to roster the individual Applicants to work at least 55 hours per week unless otherwise agreed with the individual Applicants and for as long as this is not precluded by law;

ALTERNATIVELY

The First Respondent is ordered to roster the individual Applicants to work at least 50 hours per week unless otherwise agreed with the individual Applicants and for as long as this is not precluded by law.

3. The First Respondent is ordered to compensate the individual Applicants by paying to them the difference between the amount they would have earned between 20 March 2001 and the date of Order had they worked 60

actual hours per week, alternatively 55 hours per week, alternatively 50 hours per week during that period and the amount in fact paid to the individual Applicants during that period".

3. The First Respondent provides contract guarding services to its customers and employs the individual Applicants as security officers. Between April 1996 and March 2000, the terms and conditions of employment of the individual Applicants were regulated by a labour order which provided weekly working hours, for the grade of employment applicable to the Applicants, of a maximum of 72, 60 hours of which were "ordinary" hours of work and 12 hours were overtime. As was a norm in the security industry at the time, the 72 hour week comprised six 12 hour shifts per week.

4. On 6 March 2000 Sectoral Determination 3, issued by the Minister of Labour in terms of the Basic Conditions of Employment Act 1997, became effective and provided that, for the twelve month period commencing on that date, employers and security officers were permitted to agree to work a total of 65 hours per week, of which 10 would be overtime – in other words, a working week comprising 55 ordinary and 10 overtime hours.

5. A further provision of the Sectoral Determination however was that:

"(a) With effect from one year after the implementation of this Determination the second transitional phase of schedule three of the Basic Conditions of Employment Act No 75 of 1997 as amended, comes into effect, from which time the maximum permissible weekly hours of work for a Category B security officer will be reduced to fifty;

(b) With effect from two years after the implementation of this

Determination the third transitional phase of schedule three of the Basic Conditions of Employment Act, Act No 75 of 1997 as amended, comes into effect from which time the maximum permissible weekly hours of work for any security officer will be reduced to 45 and the terms “Category A” and “Category B” will be discontinued.

6. In essence therefore, for the twelve month period from 6 March 2001 employers and security officers were in terms of the Sectoral Determination permitted to agree to work a total of 60 hours per week, of which 10 would be overtime hours.

7. Immediately prior to March 2001 and pursuant to the first phase of the Sectoral Determination, the working hours of the individual Applicants, as agreed with the First Respondent, were 60 per week. In the context of the Sectoral Determination, which, as indicated, permitted a maximum of 55 ordinary hours, 5 of those 60 hours per week constituted overtime.

8. During February 2001 the First Respondent issued a notice to all members of its staff of which the following provisions were relevant to this dispute:

“**Reduction of Working Hours**

All Staff are reminded that the Private Security Industry hours of work are to be reduced from 55 to 50 hours per week as from 6 March 2001.

The reduction is in accordance with the Security Industry Basic Conditions of Employment Act No 75 of 1997.

However it is not practical to have a 50 hour week in certain Sectors of our business. The Trade Unions are consulted over the practical 48 hour week. This

could mean that you will be required to work 4 days of 12 hour shifts and 3 days off, with effect from 6th March 2001".

9. The express terms of the individual Applicants' employment were embodied in an employment contract concluded by each of them with the First Respondent at the time of their engagement. Two specific clauses of that contract bear reference in this dispute. They are the following –

"9 Other conditions of service related to rate of pay, work hours, leave entitlement is governed and regulated by Gazette which is published by the relevant minister. These conditions will be covered and explained during induction and will change from time to time in accordance with the Government Gazette as and when published.

10 Your employment is furthermore conditional to:

…

10.5 placing my services at the disposal of the company in such a manner that the company can achieve its business objectives".

10. At the time of the staff directive referred to above, the prevailing agreement between the parties was, as I have stated, that the individual Applicants would work 60 hours per week comprising 55 ordinary hours and 5 hours overtime. The directive was in consequence rejected, the Applicants contending that they had at no stage agreed to a reduction in their actual working hours. Their contention was accordingly that notwithstanding the provisions of the Sectoral Determination requiring a formal reduction in the maximum ordinary hours from 55 to 50, the prevailing 60 hour agreement would remain of force and effect, it being an

implied term thereof, as pleaded by them that –

"When the weekly maximum permissible ordinary hours of work prescribed in the Sectoral Determination were reduced, the number of ordinary hours to be worked each week would reduce to the new maximum and the number of overtime hours required to be worked would increase correspondingly, provided that the total ordinary and overtime hours would not exceed the maxima prescribed in the Sectoral Determination".

11. The proposed reduction in ordinary working hours to 48 per week would, the Applicants therefore contend, constitute a unilateral and unlawful act on the part of the First Respondent. The Respondents on their part deny the existence of the alleged implied term relied upon by the Applicants, the effect of which would be that the 60 hour agreement would remain in force after 6 March 2001 and be adjusted to provide for 50 ordinary working hours and 10 overtime hours instead of the 55 ordinary hours and 5 overtime hours prevailing prior to that date.

12. Commendably comprehensive argument was presented by the legal representatives of the parties, traversing in detail the horological ramifications of the employment contract, the Sectoral Determinations and undisputed agreements between the parties, as well as the legal principles applicable where contracts are alleged to embody terms which are implied rather than expressed. It is unnecessary, in my view, for me to review those submissions in detail. The crisp issue, as submitted by Advocate Reynecke, representing the Respondents, is whether there was in existence and enforceable and implied term in the conditions governing the Applicants' employment which would result in the maintenance of a 60 hour working week as agreed between the parties, the ordinary and

overtime components of which would be subject to adjustment in compliance with Sectoral Determinations necessitating the alteration of the ratio of the one to the other. Thus the pre-March 2001 agreement providing for 55 ordinary hours and 5 overtime hours would, of necessity from that date be reconstituted so as to establish a maximum of 50 ordinary hours and, to maintain the aggregate, 10 hours of overtime.

13. In essence therefore, the individual applicants contend that the unilateral reduction by the First Respondent of their total working hours from 60 to 48 per week constituted an unlawful variation of their conditions of employment which, whilst complying with the maximum ordinary hours of work which came into effect from 6 March 2001, would radically reduce the remuneration earned by them, their hourly wage rate remaining unaltered whilst they would now work 2 ordinary hours less than the prescribed maximum, with no overtime whatsoever.

14. The alleged existence of such an implied term in the conditions of employment of the individual Applicants, is rejected by the Respondents. The working hour scenario at any given time, it is contended, is governed by clause 9 and, less emphatically, clause 10.5 of the individual Applicants' employment contracts.

15. The practical necessity, as a norm in the security industry, for employers to operate on a 12 hour shift basis, and the cost implications associated with overtime work, were analysed in considerable detail by Mr A W Botes who, at all material times, was a member of the executive management of the Second Respondent. His testimony on behalf of the Respondents was endorsed in that context by Mr J A Bezuidenhout who is the manager of the Johannesburg Central Branch of the First Respondent and who dealt further with certain variations to that established logistical principle where

the identity and the nature of business of the client concerned dictated this.

16. The reason why, following the promulgation of the Sectoral Determination, the First Respondent adopted a 4 day, 12 hour, shift system aggregating 48 hours per week, said Mr Bezuidenhout, was because the maintenance of a 50 ordinary hour plus 10 overtime hour week would be impossible to administer, creating instability at the site being serviced, the removal of guards in mid-shift and the incurring of untenable transport and overtime costs in an industry where the overall cost of labour is already some 70% of turnover. The implementation of a "50 plus 10" system would increase the Respondents' wage cost by some 8%, a factor which could not be passed on to clients of the company in the context of the intensely competitive nature of the industry.

17. The fact that, by reducing the actual working hours applicable to the Applicants to 48 per week, the First Respondent unilaterally effected a change to their agreed conditions of employment, is not open to debate. No provision was made in the 60 hour agreement to cater for that possibility. In the ordinary course a contract between two parties is a consensual agreement, capable of amendment only by further agreement between them, unless its own terms, or circumstances beyond their individual control, necessitates this.

18. The Respondents' case in essence, is that both those factors exist in the present instance. The Sectoral Determination in question prescribed a 50 hour working week for security officers in the category governing the employment of the individual Applicants. That was a matter beyond the control of the Respondents. Secondly, such an eventuality is envisaged in clause 9 of their employment contracts which expressly provides that specified conditions of service, including "work hours", are "governed and

regulated by Gazette" and will "change from time to time in accordance with the Government Gazette as and when published".

19. Clause 10.5 of the contract providing for the placement of the employees' services "at the disposal of the company in such a manner that the company can achieve its business objectives" was not, correctly in my view, advanced by the First Respondent as a further factor justifying the unilateral change to working hours effected by it. Mr C Todd, who appeared for the Applicants, submitted, and I agree, that regulation of the "manner" in which services are to be performed relates, in the context, to the conduct of the employees rendering those services and not to the basic conditions of their employment. For that reason, I do not propose to deal further with that specific line of argument.

20. With regard to clause 9, the Applicants argue that the reference to the regulation, *inter alia,* of hours of work by "Gazette which is published by the Minister", quite apart from the fact that it is clearly intended to relate to *ordinary* hours, cannot preclude agreement between the parties as to the *actual* hours to be worked by the employees concerned. There is nothing either in the Sectoral Determination or in that specific term of the employment contract, which precludes agreement as to the number of overtime hours which employees may work in excess of the ordinary hours prescribed, subject of course to any applicable statutory limitation in that regard.

21. I am in agreement with that submission, more particularly when regard is had to paragraph 8 of the Sectoral Determination of 6 March 2000 which makes express provision for overtime work. It reads as follows:

"Limitation of overtime: An employer shall not require or permit an employee to work overtime otherwise than in terms of an agreement concluded by the employer with the employee and such overtime shall not exceed, in the case of –

(a) a casual employee, 3 hours on any day;
(b) any other class of employee, 10 hours in any week."

22. On that basis, it will be evident that the pre-March 2001 agreement between the parties, duly adjusted to establish a "50/10" working week, would not, if maintained, fall foul in any respect of the provisions of the Determination which came into effect on that date.

23. Much of the substance of the argument submitted by both parties in the course of this hearing related to the principles governing, and the factual existence of, an implied term in the Applicants' conditions of employment which would have entitled them to continue working overtime regardless of various Sectoral Determinations. It does not seem to me however that this, in the circumstances which I have reviewed, is a material consideration. I have already made mention of the circumstances in which an agreement consensually concluded between contracting parties may be amended or varied unilaterally by either of them. For the reasons which I have stated, this does not seem to me to be such a case. The existence of the "60 hour" agreement is not in dispute insofar as it was applicable immediately prior to March 2001. There is nothing in the Sectoral Determination which renders that agreement ineffective when the ratio of ordinary to overtime hours is adjusted to comply with the Determination whilst maintaining the actual working hours for which that agreement provides. The necessity to redefine that ratio is one envisaged by clause 9 of the employment contract. The unilateral reduction in *actual* working

hours effected by the First Respondent, is not.

24. I conclude therefore that the First Respondent was not entitled, on the basis of any provision of the contracts of employment of the Applicants, unilaterally to change or vary the actual hours to be worked by them after 6 March 2001, as opposed to the maximum ordinary hours forming a component thereof, which, as I have stated, then became legislatively prescribed. Unless amended consensually in proper consultation, the actual hours which the individual Applicants were entitled to continue to work remained at 60 and if, of necessity in the light of the Determination, the overtime component thereof was increased, that issue could not justify unilateral interference by the First Respondent, whatever the perceived commercial necessity for it to do so may have been. That, as I have said, was a matter for consultation and negotiation in the ordinary course of fair labour practice.

25. For these reasons, and in the context of the amended notice of application of record in this matter, the order that I make is the following:

25.1 the First Respondent is ordered to roster the individual Applicants on five 12 hour shifts per week, unless otherwise agreed with the individual Applicants and for as long as this is not precluded by law;

25.2 the actual working week of 60 hours thereby constituted is to be defined as to the respective ordinary and overtime components thereof, so as to comply with the prevailing Sectoral Determination(s) for the private security sector;

25.3 the First Respondent is ordered to compensate the individual Applicants

by paying to them the difference between the amount they would have earned between 20 March 2001 and the date of this Order had they worked 60 hours per week, comprising 50 ordinary and 10 overtime hours, and the amount in fact paid to the individual Applicants during that period;

25.4 there is no order as to costs

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B M JAMMY
Acting Judge of the Labour Court

11 April 2002

Representation:

e Applicants::

Mr C Todd: Bowman Gilfillan Inc.

e First Respondent:

Advocate J J Reynecke S.C. instructed by Sampson Okes Higgins Inc.