IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case No. **C536/06**

In the matter between:

FOOD & ALLIED WORKERS UNION (FAWU) Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION (CCMA) First Respondent

PIET VAN STADEN Second Respondent
OCEANA GROUP LIMITED Third Respondent

JUDGMENT

NEL, AJ

1. This is an application for relief in terms of Section 145 of the Labour Relations Act, 66 of 1995 ("the LRA"). The Applicant seeks to have this Court review the decision of the Second Respondent ("the Commissioner") and the Applicant seeks an order in the following terms:

2. That the arbitration award of the Second Respondent under case no. WE8802/2004 be reviewed and set aside in its totality;

3. That the above-mentioned arbitration award be corrected, alternatively substituted to cure the defects alleged by the Applicant;

4. In the alternative to the prayer sought in 1.2 above, that the dispute be remitted back to the First Respondent to be reheard by it for determination by a Commissioner other than the Second Respondent;

5. That any Respondent opting to oppose this application pay the Applicant's costs;

6. That further and/or alternative relief be granted to the Applicant.

1. A brief history of the matter is supplied by way of background.

7. The Applicant and the South African Pelagic Fish Processors Association ("SAPFPA") entered into a Collective Agreement on 18 July 2002 for the period 1 August 2002 to 31 July 2003, which period was subsequently extended to cover the period 1 August 2003 to 1 July 2004. I shall further refer to this as "the Collective Agreement"

8. The Third Respondent is a member of SAPFPA and as such a party to and bound by the Collective Agreement referred to.

9. A dispute arose between the Applicant and the Third Respondent regarding the proper interpretation of the provisions of clause 10 of the Collective Agreement, more particularly the proper interpretation of clauses 10.3 and 10.4 thereof.

10. The relevant provisions of clause 10 of the Collective Agreement read as follows:

11. "**10. <u>Public Holidays and Sundays</u>**

10.1 …

10.2 …

10.3 Should work be required to be performed on a Sunday or Public Holiday, such work shall be paid in accordance with the latest legislation.

10.4 Should work be required to be performed on a Sunday, such work shall be paid as follows:

0 to 4 hours work = 9,25 hours payment

More than 4 and up to 9,25 hours work = 18,25 hours payment

More than 9,25 hours work = double hours worked payment"

12. The Applicant herein represents employees of the Third Respondent. A dispute arose between the Applicant and its members on the one hand and the Third Respondent on the other, the Applicant contending that all employees of the Third Respondent who worked or performed services during Sunday hours had to be

remunerated in terms of clause 10.4. This, so the Applicant contends, will include employees who commenced a shift on a Saturday evening and only completed the shift on a Sunday.

13. The Third Respondent contends that clause 10.3 of the Collective Agreement applied to Employees who ordinarily worked on a Sunday, whereas clause 10.4 only applied to employees who were asked to work on a Sunday, when they were not ordinarily obliged to do so. The Third Respondent accordingly argues that employees who commenced the shift on a Saturday and only completed it on the following Sunday, will be paid in accordance with the provisions of clause 10.3 for the period worked on a Sunday.

14. The parties were unable to resolve their differences in respect of the interpretations of clause 10 and the matter ended up in the CCMA on 12 August 2004 where the Commissioner heard evidence and he handed down his award on 16 August 2004.

15. The Commissioner in his award indicated that the Applicant was unhappy because the Third Respondent would only pay double rates for Sunday work and not the rates as prescribed by clause 10.4. The Applicant contended that this was contrary to both the agreement as well as practice and that companies which had signed the Collective Agreement, and who are not part of the Third Respondent, pay their employees for work on Sundays in accordance with clause 10.4.

16. It appears from the Commissioner's award, as well as from the transcript of the arbitration proceedings, and it was common cause between the parties, that the Third Respondent paid time and a half for Saturday work.

17. The Applicant argued before the Commissioner that, if an employee of the Third Respondent starts his/her shift at 19h00 on a Saturday evening, and is supposed to work until 07h00 on Sunday, that employee must be paid time and a half for the 5 hour period 19h00 until 24h00. For this period the employee will then be paid 7,5 hours' wages. For the hours worked on the Sunday, from 00h01 until 07h00, the employee should be paid in terms of clause 10.4. If this were to happen, as the employee would be working "*more than 4 and up to 9,25 hours work*" on the Sunday, that employee would then have received 18,25 hours payment for the 7 hours worked in terms of clause 10.4 of the Collective Agreement. This, plus the 7,5 hours pay for the Saturday portion worked, comes to a total effective payment of 25,75 hours'

wages – a little more than double time for the whole period.

18. The Third Respondent, however, argued before the Commissioner that it complied with the Collective Agreement as it paid its employees in terms of the Basic Conditions of Employment Act. In the aforementioned example used by the Applicant, the Third Respondent would accordingly pay that employee time and a half for the period 19h00 until 24h00 on Saturday (7,5 hours) and double time for the period 00h01 until 07h00 on the Sunday (14 hours). In terms of the Respondent's practice, the employee in the given circumstances would be paid a total of 21,5 hours' wages (as opposed to the Applicant's contention that the employee should receive 25,75 hours' wages).

19. So the dispute centered on the Applicant contending that the employee in the circumstances described ought to be paid 18,25 hours for the 7 hours worked on the Sunday, and not the 14 hours as was paid by the Third Respondent. (As stated, the parties were in agreement, and the Third Respondent did pay time and a half for the hours worked on the Saturday.)

20. The Applicant adduced evidence in the arbitration that employees work with fish and that the supply dictates the hours worked. As soon as the fish had been finished, the employees would leave despite the amount of hours worked.

21. The Third Respondent adduced evidence in the arbitration to the effect that it was the Third Respondent's view that clause 10.4 only pertained to incomplete shifts and to someone who is called out on a Sunday to perform work and who is not scheduled to work a shift. The Third Respondent further testified and argued that, because the employee is called out on a Sunday, a "*penalty*" is levied on the employer to pay the employee more than what the employee would be entitled in terms of current legislation. The Third Respondent disagreed with the notion that clause 10.4 would apply to regular shifts where the shift extended from a Saturday into a Sunday.

22. The Commissioner indicated in his award that the 1997/1998 and the 1998/1999 Collective Agreements contained similar clauses to clause 10.4. Clause 10.4 was removed from the 1999/2000, 2000/2001 and 2001/2002 Collective Agreements and was again adopted in the 2003/2004 Collective Agreement – which is the agreement the parties sought to have interpreted by the Commissioner. The Commissioner, having summarised the "*background to the dispute and evidence*" had the following

to say in coming to his conclusion:

> "***Assessment of the evidence and argument***
>
> *I am of the view that clause 10.4 pertains to incomplete shifts only. Clause 10.3 states that work on Public Holidays and Sunday will be paid in accordance with current legislation. It means thus time and half for Saturday and double time for Sunday work.*
>
> *I support the interpretation advanced by (Third) Respondent as regards Clause 10.4. It is of note that such a clause was not part of the Collective Agreement for a number of years, from 2000 until the 2003/2004 – year, and that it could not have been the norm to pay Sunday work on the basis suggested by Applicant. A clause with the same wording as that of Clause 10.3 is found in each of the agreements.*
>
> *My assessment of the 2 clauses is that they are mutually exclusive. It suggests that clause 10.4 was put in for a particular purpose and not for general application as was submitted by Applicant.*
>
> *While I agree that the wording of the two clauses could have been framed more elegantly, the interpretation submitted by Respondent of Clause 10.4 is to be preferred.*
>
> ***Award***
>
> *I find that clause 10.4 of the Collective Agreement entered into for the period 1 August 2003 until 31 July 2004 pertains to uncompleted shifts only.*"

23. This award the Applicant contends is reviewable on the following grounds:

24. The Second Respondent failed to properly apply his mind to the facts and evidence before him and arrived at the conclusion which is not rationally justifiable when deciding on the interpretation of the Collective Agreement favoured by the Third Respondent;

25. The Second Respondent took into account irrelevant evidence when interpreting the said Collective Agreement;

26. The Second Respondent grossly misconstrued the law applicable to a proper determination of the Applicant's dispute, with the result that the Second Respondent

failed to interpret the Collective Agreement so as to give effect to its express terms.

27. The Applicant argued before me that the parol evidence (or the integration rule) is the legal principle which applies herein. This rule places a limit on the evidence that may be adduced in aid of interpretation of a written contract.

28. The Applicant further argued that, as a Collective Agreement is a written memorandum which is meant to reflect the terms and conditions to which the parties have agreed at the time that they concluded the agreement, courts and arbitrators must therefore strive to give effect to that intention and in interpreting Collective Agreements, courts and arbitrators must apply the parol evidence rule.

29. The Applicant submitted that the Commissioner was obliged to interpret the agreement in terms of its express wording as it is not vague or ambiguous and that the Commissioner should not have admitted oral evidence altering the agreement for the parties. The Commissioner, so the Applicant argued, was obliged to interpret the agreement as it stood.

30. The Third Respondent, unsurprisingly, contended that reference to surrounding circumstances is justified in cases of uncertainty or ambiguity and as the wording of Clause 10, as it stands, is unclear and ambiguous, the Commissioner was justified in considering extrinsic evidence in aid of interpretation.

31. The Third Respondent raised a further point namely that, as the Applicant's representative had led extrinsic evidence concerning the circumstances surrounding Clause 10 and that the Applicant has accordingly waived its rights to object to the leading of extrinsic evidence. In fact, so the Third respondent argued, the Applicant went further in that it did not object to the oral evidence adduced by the Third Respondent. It was argued before me that the Applicant should have raised an objection with the Commissioner during the arbitration proceedings (to the Third Respondent adducing evidence) and the Applicant should also not have adduced evidence concerning the circumstances surrounding Clause 10. Accordingly, so the Third Respondent argued, the Applicant had waived its right to now object to the fact that the Commissioner had allowed extrinsic evidence.

32. I turn to first deal with the question whether the Applicant has waived its right to now raise the leading of extrinsic evidence as a ground for review.

33. We clearly do not here have an express waiver of the Applicant's rights in respect of the question whether the Commissioner was entitled to hear extrinsic evidence.

34. In Hepner v Roodepoort – Maraisburg Town Council 1962(4) SA 772(A) Steyn CJ (at 778 D) said:

> "*There is authority for the view that in the case of waiver by conduct, the conduct must leave no reasonable doubt as to the intention of surrendering the right in issue …*"

35. In Laws v Rutherfurd 1924 AD 262 (at 263), Innes CJ said:

> "*The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.*"

36. In Borstlap v Spangenberg en Andere 1974(3) SA 695(A) (at 704F) Corbett AJA said:

> "*Dit is herhaaldelik deur ons Howe beklemtoon dat duidelike bewys van 'n beweerde afstanddoening van regte geverg word, veral waar op 'n stilswyende afstanddoening staat gemaak word. Dit moet duidelik blyk dat die betrokke persoon opgetree het met behoorlike kennis van sy regte en dat sy optrede teenstrydig is met die voortbestaan van sodanige regte of met die bedoeling om hulle af te dwing.*"

37. The learned author, Christie, says about the parol evidence or integration rule that it

1.1 "*……is a dog which has been given a bad name. May para 630, following Taylor and Wigmore, said: 'This topic is the most difficult, subtle and complicated in the whole of the law and Hoffman and Zeffertt 293, adapting Voltaire's memorable phrase, call it 'an expression which shares with the Holy Roman Empire the distinction of being misleading in all three of its component parts'."*

1.2 (Christie The Law of Contracts in South Africa 3rd Edition page 212)

38. With that in mind, I do not believe that the Applicant's representative had any, never mind full, knowledge of the Applicant's rights. I do not believe there is any question that the Applicant, with full knowledge of its rights, abandoned them – it certainly did not do so expressly and I do not believe its conduct was consistent with an intention to abandon or waive any of its rights.

39. Being satisfied that the Applicant did not waive any of its rights relating to the parol

evidence rule, the question, which arises here, is, how should the Commissioner have approached the matter against the clear dictates of the parol evidence rule. This rule was stated in Lowrey v Steedman 1914 AD 532 (at 543) as follows:

> "*The rule is that when a contract has once been reduced to writing no evidence may be given of its terms except the document itself, nor may the contents of such document be contradicted, altered, added to or varied by oral evidence.*"

40. In Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd 1941 AD 43 at 47, Watermeyer JA described the parol evidence rule in the following terms:

> "*Now, this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such a document be contradicted, altered, added to or varied by parol evidence.*"

41. In what can be regarded as one of the leading cases dealing with the parol evidence rule (Scottish Union and National Insurance Company Limited v Native Recruiting Corporation Limited 1934 AD 458) one finds the following:

> "*Now in construing a contract we must not only consider the intention of one party, as we do in construing a will or an act of the legislature, but we must see what both parties intended, and we must guard ourselves against making a contract for the parties. We have no right, because we may think that the contract is a hard bargain, to lean towards a construction more reasonable to the insured than the contract constituted by the words of the document … We must gather the intention of the parties from the language of the contract itself, and if that language is clear, we must give effect to what the parties themselves have said; … it has been repeatedly decided in our courts that in construing every kind of written contract the court must give effect to the grammatical and ordinary meaning of the words used therein. In ascertaining this meaning, we must give to the words used by the parties their plain, ordinary and popular meaning, unless it appears clearly from the context that both the parties intended them to bear a different meaning.* ***If, therefore,***

there is no ambiguity in the words of the contract, there is no room for a more reasonable interpretation than the words themselves convey. If, however, the ordinary sense of the words necessarily leads to some absurdity or to some repugnance or inconsistency with the rest of the contract, then the court may modify the words just so much as to avoid that absurdity or inconsistency but no more." (My emphasis.)

See pages 465 – 466 of the judgment.

42. These principles have consistently been followed in our courts. In Total SA (Pty) Ltd v Bekker NO 1992(1) SA 617(A) Smalberger JA said:

    43. "*What is clear, however, is that where sufficient certainty as to the meaning of a contract can be gathered from the language alone it is impermissible to reach a different result by drawing inferences from the surrounding circumstances ….. The underlying reason for this approach is that where words in the contract, agreed upon by the parties thereto, and therefore common to them, speak with sufficient clarity, they must be taken as expressing their common intention ….*"

    44. See pages 624(I) – 625(B) of the judgement

45. What is accordingly very clear is that, where a court, or a Commissioner of the CCMA for that matter, is tasked to interpret a written contract, or as in the present case, a Collective Agreement, it must give to the words used by the parties their plain, ordinary and popular meaning and if there is no ambiguity in the words of the contract, they must be given their plain, ordinary and popular meaning.

46. A perusal of both the transcript of the arbitration proceedings as well as of the Commissioner's award does not yield any indication of the fact that the Commissioner was alert to the fact that he had to first of all make a determination whether the words of the Collective Agreement were unclear or ambiguous. A perusal of the transcript of the arbitration proceedings as well as the Commissioner's award further discloses that the way the Commissioner herein approached the matter was that he simply assessed the evidence adduced before him, which evidence did not at all deal with what the intention of the parties were at the time of entering into the Collective Agreement. As a matter of fact, not one of the witnesses who testified was in fact party to the actual negotiations leading up to the Collective Agreement.

47. The evidence which the Commissioner considered accordingly merely amounts to the two opposing interpretations of clause 10 which the Applicant and the Third Respondent had and which they presented in evidence to the Commissioner.

48. As clearly reflected by the Commissioner's award, he therefore merely assessed the two interpretations offered by the respective parties and came to the conclusion that "*I support the interpretation advanced by (Third) Respondent as regards clause 10.4*."

49. I am of the view that evidence of the construction or interpretation of a particular party, who was not even present at the negotiations leading to the particular agreement, nor was he/she a party to the agreement in the sense that he/she entered into the agreement, is not permissible and may not be relied on by a court when it is confronted with the task of interpreting a written agreement. An attempt must be made to determine the intention of the parties to the contract from the contract itself and from evidence which indicates how the parties to the contract themselves understood the contract. (SA General Electric Co (Pty) Ltd v Sharfman and Others NNO 1981(1) SA 592(W) at 598 C – F)

50. I am of the view that the Commissioner erred in this regard by entertaining the interpretations of the two parties who were not party to the actual Collective Agreement and then, exactly as he stated, preferring the one to the other. The Collective Agreement only applied to them. As I indicated, the parties before the Commissioner were not present at the negotiations, which led to the Collective Agreement, nor were they even the parties who actually entered into the Collective Agreement. In fact, the parties were only the ones who had to implement the Collective Agreement and the recipients of the benefits thereunder.

51. I further believe that the Commissioner failed to apply the proper test applicable in respect of the interpretation of the Collective Agreement before him in that he ought to have first of all made a determination whether there is an ambiguity contained in Clause 10 of the Collective Agreement.

52. Only once the Commissioner had made this determination, namely that there is indeed an ambiguity or absurdity in Clause 10 of the Collective Agreement, should he have advanced to the next exercise namely to determine whether he is able to modify the words to avoid that ambiguity, absurdity or inconsistency, but no more.

53. If the Commissioner was of the view that he would require extrinsic evidence to assist him in ascertaining what the intention of the parties to the agreement was, then I am of the view that only persons or parties who were actually part of the negotiations which culminated in the written agreement, or in their absence, witnesses who had direct knowledge of what the intention of the parties was, could have been relied on by the Commissioner to try and make a determination of what the intention of the parties was with Clauses 10.3 and 10.4 of the Collective Agreement.

54. The manner in which parties to the agreement carried it out is permissible as an indication of the common understanding of its meaning. In this regard the evidence was that many of the other employer parties to the Collective Agreement had implemented clause 10.4 of the Collective Agreement in the manner which the Applicant sought it to be interpreted. It would appear as if the Commissioner had no regard to this evidence at all and he did not consider it, or afford it any weight.

55. The Commissioner expresses the view that Clause 10.4 pertains to incomplete shifts only. That conclusion of his is purely based on the say-so of the witness called on behalf of the Third Respondent. There is in my view absolutely no support whatsoever for this conclusion by having regard to the ordinary meaning of Clauses 10.3 and 10.4 of the Collective Agreement.

56. The Commissioner then makes the statement that:

> "*Clause 10.3 states that work on Public Holidays and Sunday will be paid in accordance with current legislation. It means thus time and a half for Saturday and double time for Sunday work.*"

This is clearly an error in law. The Basic Conditions of Employment Act (the BCEA) does not determine that Saturday work gets paid at time and a half, nor does it regulate the rate of pay for work on Saturdays. It only does so in respect of work on Sundays and Public Holidays (Sections 16 and 18 of the BCEA). The Commissioner's statement further is an error of fact in that Clause 10.3 does not at all regulate the rate of pay for work on Saturdays.

2. I further could not find a rational objective basis justifying the Commissioner's conclusion that "It is of note that such a clause (with reference to Clause 10.4) was not part of the Collective Agreement for a number of years, from 2000 until 2003/2004 year and that it could not have been the norm to pay Sunday work on the basis suggested by Applicant." A perusal of the evidence adduced on behalf of the Applicant. In my view, the evidence adduced was rather the opposite namely that it

was the norm that employers paid their employees in terms of Clause 10.4. This was in support of the contention that many of the employers party to the agreement paid their workers in compliance with Clause 10.4, whereas the Third Respondent was in effect the employer who was the exception to the rule.

57. Having carefully considered the evidence adduced at the arbitration hearing before the Commissioner, as well as the wording of Clauses 10.3 and 10.4 of the Collective Agreement, I do not believe that the Commissioner's conclusion, that Clause 10.4 of the Collective Agreement entered into for the period 1 August 2003 until 31 July 2004, pertains to uncompleted shifts only, to be justifiable in the sense that it is capable of objective substantiation.

58. This conclusion of the Commissioner is in my view also not capable of reasonable justification when regard is had to the factual premises on which his conclusion is based.

59. I further do not believe that the Commissioner provides sufficient reasons for his conclusion and such reasons as he does give do not justify the conclusion that he reached.

60. I accordingly find that the conclusion of the Commissioner reached is not justifiable having regard to the reasons given (or the failure to give reasons) and I do not believe his conclusions are defensible and arrived at by means of important logical steps in reasoning to get him to arrive at his conclusions.

61. I also do not believe that the Commissioner applied his mind properly to the issues at hand, nor did he reason his way to the conclusion he reached.

62. I have accordingly concluded that the Second Respondent's arbitration award under case no. WE8802/04 dated 16 August 2005 is to be reviewed and set aside.

63. The Applicant seeks to have the award corrected, alternatively, substituted to cure the defects alleged by it and in the alternative, the Applicant asks that the dispute be remitted back to the First Respondent to be re-heard by it for determination by a Commissioner other than the Second Respondent. In deciding whether to correct the award or to refer it back to the First Respondent, I was mindful of what the learned Wessels CJ said in the Scottish Union case namely that, if the ordinary sense of the words leads to some absurdity, or to some repugnance or inconsistency with the rest of the contract, then the court may modify the words just so much as to avoid that absurdity or inconsistency, but no more.

64. Mr Steenkamp, on behalf of the Third Respondent, argued before me that if Clause 10.3 stood on its own, employees who worked on a Sunday would (in terms of Section 16 of the BCEA) be paid at double or one and a half times the employees' wage for each hour worked (as the case may be. Clause 10.4 on the other hand contradicts clause 10.3 in that it determines that, should work be required to be performed on a Sunday, if an employee worked 0 – 4 hours, he will be paid for 9,25 hours; if he worked between 4 – 9,25 hours, he will get paid 18,25 hours; and if he worked more than 9,25 hours, he will get paid for double the hours worked.

65. Clause 10.3, in my view, is no more than a statement of the law as is contained in Sections 16 and 18 of the BCEA. Paraphrased, it simply means that if an employee is required to work on a Sunday or a Public Holiday, he/she will be paid in terms of the provisions of sections 16 and 18 of the Basic Conditions of Employment Act.

66. Clearly, having regard to the introductory part of Clauses 10.3 and 10.4 (which are exactly the same, but for the fact that “Public Holiday” is contained in Clause 10.3 and not in Clause 10.4), and further having regard to the fact that Clause 10.3 had been in all the previous Collective Agreements, but Clause 10.4 had been inserted, taken out, and then put back in, I am of the view that the intention of the parties was that Clause 10.4 should alter the way employers in the industry will pay for work performed on a Sunday.

67. Being mindful of the fact that I am entitled to modify the words just so much as to avoid absurdity or inconsistency, I am of the view that the deletion of the words "*Sunday or*" from Clause 10.3 will avoid absurdity, inconsistency or ambiguity.

68. In arriving at the aforementioned conclusion, I had regard for the context in which the Collective Agreement was negotiated.

69. I was equally mindful of Froneman DPJ's sentiments expressed in North East Cape Forests v S A Agricultural Plantation and Allied Workers Union and Others (1997) 18 ILJ 971 (LAC) where he said (at 966) that:

> "*In the case of a collective agreement, the parties are in an employment relationship, with conflicting interests: their agreement generally represents a compromise that is the result of a protracted process of negotiation, and may follow the exercise of power. I do not therefore think a collective agreement can be properly interpreted without full regard for the context in which it is*

negotiated … In my opinion the effective resolution of labour disputes is not promoted by reliance on a legal rule of evidence which restricts the abilities of parties to present the argument at a forum such as this.

3. I further agree respectfully with Froneman DPJ's sentiments in the ***North East Cape Forests*** judgment (supra) that the primary objects of the LRA are to advance economic development, social justice, labour peace and the democratisation of the workplace, and that these objectives are better served by the practical approach to the interpretation and application of the collective agreement rather than by reference to purely contractual principles. (at 980)"

70. I accordingly had regard to the fact that the evidence before the Commissioner was to the effect that many other employer parties to the Collective Agreement had interpreted the agreement as simply meaning that, if an employee works on a Sunday, whether he/she started on a proceeding Saturday, for the hours worked on the Sunday, the employee will be paid as directed by Clause 10.4 of the Collective Agreement. Nothing in the agreement certainly supports the contention put forward by the Third Respondent's witness that it was intended as a penalty and only in respect of employees who are called out on a Sunday to perform work but who are not scheduled to work a shift (on a Sunday).

71. It should also be noted that in a memorandum of 5 April 2004, from the Third Respondent, it advised the Applicant that "*… payment of Sunday hours will be extended to the bargaining unit at St Helena Bay Fishing as per clause 10.4 of the 2003/4 Inshore wage agreement and in line with other Inshore companies paying the higher rate. This is to insure that we are paying a competitive rate and improved benefits compared to our competitors.*"

72. I noted with interest what is further contained in this letter of 5 April 2004 namely that "*FAWU members would thus commit to work the full shift where it is reasonably required to do so and with the understanding that payment will then be in line with clause 10.4 of the 2003/4 Inshore wage agreement. We are however concerned that after our meeting, employees once again only worked 4 hours and not the full shift on Sunday.*

73. *Although we have agreed to implement clause 10.4 with effect from 2004/5 Inshore wage agreement being concluded, we are prepared to effect its implementation immediately but under the commitment from FAWU to address with its members the commitment to work a full shift on Sundays.*"

4. I am of the view that, having considered the evidence of Mr Alexander, it would appear as if the Third Respondent used the payment in terms of Clause 10.4 to induce its workers to work a full shift and not to leave after only having worked 4 hours on a Sunday.

74. More importantly, in addition to the fact that the Third Respondent in the stated letter confirms that other Inshore competitor companies are paying the higher rate (contained in Clause 10.4 of the Collective Agreement), the Third Respondent expressly indicates that it will pay hours worked on Sundays in terms of Clause 10.4 and one does not see any reference in this communication to such willingness being linked to whether the employee is called out on a Sunday to perform work or to penalties or any other "*conditions*". It plainly and simply states that "*payment of Sunday hours will be extended to the Bargaining Unit at St Helena Bay Fishing as per clause 10.4 of the 2003/4 Inshore wage agreement and in line with other inshore companies paying the higher rate*".

75. I am accordingly of the view that this Court may modify the Collective Agreement rather than to refer the matter back to the First Respondent.

76. The parties were in agreement that in applying the principles applicable in this court relating to the awarding of costs, there are no reasons present in this matter why the costs should not follow the result.

77. In the result I make an order in the following terms:

78. The arbitration award of the Second Respondent in case reference no. WE8802/04 dated 16 August 2004 is hereby reviewed and set aside;

79. Clause 10.3 of the Collective Agreement is amended by the deletion of the words "*Sunday or*"; and

80. The Third Respondent is ordered to pay the Applicant's costs.

NEL AJ

DATE OF HEARING: 9 SEPTEMBER 2005.

DATE OF JUDGMENT: 27 January 2006

APPEARANCE FOR THE APPLICANT: MR J WHYTE OF CHEADLE THOMPSON HAYSOM ATTORNEYS.

APPEARANCE FOR THE THIRD RESPONDENT: MR A STEENKAMP OF SONNENBERGS ATTORNEYS.