



**IN THE HIGH COURT OF SOUTH AFRICA  
[EASTERN CAPE DIVISION, MTHATHA]**

**CASE NO.: 5448/2021**

In the matter between:

<b>NOKUTHULA CYNTHIA MNCWATI</b>	<b>1<sup>ST</sup> APPLICANT</b>
<b>ELLIOT WILLIAM</b>	<b>2<sup>ND</sup> APPLICANT</b>
<b>MZIMASI NQADOLO</b>	<b>3<sup>RD</sup> APPLICANT</b>
<b>MLINDELI BIYATA</b>	<b>4<sup>TH</sup> APPLICANT</b>
<b>SIBUSISO MJALI</b>	<b>5<sup>TH</sup> APPLICANT</b>
<b>LLOYD LOYISO NONTOMBANA</b>	<b>6<sup>TH</sup> APPLICANT</b>
<b>MBULELO GXOTA</b>	<b>7<sup>TH</sup> APPLICANT</b>
<b>NELISWA PATRICIA NOKILANA</b>	<b>8<sup>TH</sup> APPLICANT</b>
<b>NONTANDABUZO FLY</b>	<b>9<sup>TH</sup> APPLICANT</b>
<b>SICELO KATA</b>	<b>10<sup>TH</sup> APPLICANT</b>
<b>WELEKAZI PATRICIA MANGE</b>	<b>11<sup>TH</sup> APPLICANT</b>
<b>ZUZEKA CETYIWE</b>	<b>12<sup>TH</sup> APPLICANT</b>
<b>NONTANDO NGCOTWANA</b>	<b>13<sup>TH</sup> APPLICANT</b>
<b>NELISWA GUBANCA</b>	<b>14<sup>TH</sup> APPLICANT</b>
<b>NOLITA NDOTSHANGA</b>	<b>15<sup>TH</sup> APPLICANT</b>
<b>ZOLEKA OSCARIA VUNDLE</b>	<b>16<sup>TH</sup> APPLICANT</b>

**THABO NKWINTSHI**

**17<sup>TH</sup> APPLICANT**

**MPUMELELO NTABENI**

**18<sup>TH</sup> APPLICANT**

**VUYISA NCOLA**

**19<sup>TH</sup> APPLICANT**

**XOLISANI ISAAC DINGISWAYO**

**20<sup>TH</sup> APPLICANT**

**NDUMISO MAZWI**

**21<sup>ST</sup> APPLICANT**

**and**

**KING SABATA DALINDYEBO LOCAL MUNICIPALITY**

**RESPONDENT**

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**JUDGMENT**

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**NORMAN J:**

[1] The 1<sup>st</sup> to 21<sup>st</sup> applicants (applicants) are employees of the King Sabata Dalindyebo Local Municipality (the municipality). They brought an application wherein they seek the following orders:

- “1. That the respondent's failure to give the applicants information in writing about their rate of remuneration, number of hours they worked on each day they are paid at their workplace be and is hereby declared unlawful.
2. That the respondent be and is hereby directed to forthwith give applicants information in writing about their rate of remuneration, number of hours they worked on each day they are paid at their workplace.<sup>1</sup>
3. That the respondent's action of calculating applicants' remuneration on a formular applicable to office workers whereas they are shift workers be and is hereby declared unlawful.
4. That the respondent be and is hereby directed to forthwith calculate applicants' remuneration using a formular applicable to shift workers.
5. That the respondent be and is hereby directed to forthwith work out the remuneration short paid and pay the applicants retrospectively from June 2014.
6. The respondent be and is hereby directed ordered to pay cots of the application.
7. Further and/or alternative relief.”

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<sup>1</sup> A slight amendment to para 2 of the notice of motion was sought and was not opposed (it was a deletion of declared and insertion of directed). It was accordingly granted.

[2] The application is opposed by the municipality. Mr Zono appeared for the applicants and Mr Maswazi for the municipality.

*The parties*

[3] The first applicant is NOKUTHULA CYNTHIA MNCWATI describes herself as a major female South African citizen who is an employee of the municipality and an Access Control Officer attached to the Law Enforcement Section-Civil Protection. She is also a Shop-steward- Access Control Officer.

[4] The second applicant is ELLIOT WILLIAMS a major male South African citizen who is an employee of the municipality and an Access Control Officer attached to the Law Enforcement Section-Civil Protection.

[5] The third applicant is MZIMASI NQADOLO a major male South African citizen who is an employee of the municipality and an Access Control Officer attached to the Law Enforcement Section-Civil Protection.

[6] The fourth applicant is MLINDELI BIYATA a major male South African citizen who is an employee of the municipality and an Access Control Officer attached to the Law Enforcement Section-Civil Protection.

[7] The fifth applicant is SIBUSISO MJALI a major male South African citizen who is an employee of the municipality and an Access Control Officer attached to the Law Enforcement Section-Civil Protection.

[8] The sixth applicant is LLOYD LOYISO NONTOMBANA a major male South African citizen who is an employee of the municipality and an Access Control Officer attached to the Law Enforcement Section-Civil Protection.

- [9] The seventh applicant is MBULELO GXOTA a major male South African citizen who is an employee of the municipality and an Access Control Officer attached to the Law Enforcement Section-Civil Protection.
- [10] The eighth applicant is NELSON PATRICIA NOKILANA a major female South African citizen who is an employee of the municipality and an Access Control Officer attached to the Law Enforcement Section-Civil Protection.
- [11] The ninth applicant is NONTANDABUZO FLY a major female South African citizen who is an employee of the municipality and an Access Control Officer attached to the Law Enforcement Section-Civil Protection.
- [12] The tenth applicant is SICELO KATA a major male South African citizen who is an employee of the municipality and an Access Control Officer attached to the Law Enforcement Section-Civil Protection.
- [13] The eleventh applicant is WELEKAZI PATRICIA MANGE a major female South African citizen who is an employee of the municipality and an Access Control Officer attached to the Law Enforcement Section-Civil Protection.
- [14] The twelfth applicant is ZUZEKA CETYIWE a major female South African citizen who is an employee of the municipality and an Access Control Officer attached to the Law Enforcement Section-Civil Protection.
- [15] The thirteenth applicant is NONTANDO NGCOTWANA a major female South African citizen who is an employee of the municipality and an Access Control Officer attached to the Law Enforcement Section-Civil Protection.

- [16] The fourteenth applicant is NELISWA GUBANCA a major female South African citizen who is an employee of the municipality and an Access Control Officer attached to the Law Enforcement Section-Civil Protection.
- [17] The fifteenth applicant is NOLITHA NDOTSHANGA a major female South African citizen who is an employee of the municipality and an Access Control Officer attached to the Law Enforcement Section-Civil Protection.
- [18] The sixteen applicant is ZOLEKA OSCARIA VUNDLE a major female South African citizen who is an employee of the municipality and an Access Control Officer attached to the Law Enforcement Section-Civil Protection.
- [19] The seventeenth applicant is THABO NKWINTSHI a major male South African citizen who is an employee of the municipality and an Access Control Officer attached to the Law Enforcement Section-Civil Protection.
- [20] The eighteenth applicant is XOLILE NICHOLAS NGQOBOKA a major male South African citizen who is an employee of the municipality and an Access Control Officer attached to the Law Enforcement Section-Civil Protection.
- [21] The nineteenth applicant is VUYISWA NCOLA a major male South African citizen who is an employee of the municipality and an Access Control Officer attached to the Law Enforcement Section-Civil Protection.
- [22] The twentieth applicant is XOLANI ISAAC DINGISWAYO a major female South African citizen who is an employee of the municipality and an Access Control Officer attached to the Law Enforcement Section-Civil Protection.
- [23] The twenty-first applicant is NDUMISO MAZWI a major female South African citizen who is an employee of the municipality and an Access Control Officer

attached to the Law Enforcement Section-Civil Protection. I shall refer to the 1<sup>st</sup> to 21<sup>st</sup> applicants as (“applicants”).

[24] The respondent is KING SABATA DALINDYEBO LOCAL MUNICIPALITY (the municipality) an organ of State within the local sphere of Government established in terms of section 12 of Local Government: Municipal Structures Act No.117 of 1998 with its place of business at Munitata Building, corner Sutherland and Owen Street, Mthatha.

*Applicants case*

[25] It is common cause that the applicants are shift workers and not office workers. What gave rise to the application are allegations that, as Access Control officers, the applicants work twelve hours per day, whereas office workers work eight hours per day. In calculating their remuneration, the municipality treats them as office workers and calculates their remuneration on an eight-hour basis thus resulting in underpayment of four hours per day. The applicants complain that from June 2014 until September 2016 (as clarified in argument) the municipality used to reflect the rate of pay but thereafter stopped doing so. They dealt with the applicable rates over the years in their founding affidavit but in their replying affidavit, the applicants, attached some of their payslips where the ‘rate of pay’ was reflected. The rates are reflected as follows:

<b>Month</b>	<b>Rate of pay</b>
14/07/25	48.46
15/06/25	49.20
15/11/25	52.64
16/01/25	52.64

- [26] The applicants contend that remuneration has to be calculated as follows: rate of pay x number of hours worked x 16 days = month's salary or remuneration. They allege that the municipality is not paying them according to the agreed formula. The other complaint is that the municipality no longer gives the applicants information in writing about their rate of remuneration, number of ordinary hours worked, number of hours worked by each employee on Sunday and public holidays; and the shift allowance rate. This, the applicants view as a contravention of the provisions of section 33 (1) (g) read with section 35 of the Basic Conditions of Employment Act No. 75 of 1997 (the BCEA).
- [27] On 13 October 2021 their attorneys of record directed a letter to the municipality demanding information in terms of those provisions to which no response was received. The applicants contend that the actions of the municipality amount to an illegality as they offend the contractual obligations between the parties.
- [28] They also allege that they have been requesting adjustments to the calculation of their salaries, but the municipality refused to do so. They relied on a memorandum submitted by their Director, Mr Kettleidas, to the Director for Corporate Services who, according to them, negatively influenced the municipality, not to accede to their request.

[29] For the sake of completeness the memorandum stated:

“MEMORANDUM

TO : THE DIRECTOR CORPORATE SERVICES  
CC : CONCERNED SHIFT WORKERS  
FROM : DIRECTOR PUBLIC SAFETY & TRAFFIC MANAGEMENT  
DATE : 05 FEBRUARY 2021  
SUBJECT: ENQUIRY RATE OF PAY FOR SHIFT WORKERS

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The above mentioned subject bears reference.

Attached hereto find enquiry from shift workers regarding their rate of pay. The initial bone of contention is that they claim that they are working more than the regulated 40 hours per week, but that they are not compensated therefor.

Should the response be in favour of the employees concerned, it can drain the institution which is already cash strapped.

Remember it will affect the entire institution e.g your Access Control Employees, Traffic officers, Wardens, Law Enforcement as well as Fire Department.

In a case where they are successful they will be going as far back when this labour agreement came into play and for some of them it may be more than ten years.

This office would like your specialist response regarding this claim. Kindly advise. Thank you.

.....

D. KETTLEDAS

DIRECTOR PUBLIC SAFETY & TRAFFIC MANAGEMENT”

### *Municipality's case*

[30] The municipal manager, Mr Ngamela Pakade deposed to the answering affidavit. In resisting the relief sought the municipality advanced the following grounds:



- 30.1 The applicants are shift workers and are entitled to a shift allowance of 6% of their monthly salary in terms of the collective agreement concluded between the Unions and the South African Local Government Association (SALGA). Shift workers work four days in a week and are off one day of the working week. When they work night shift they are paid night shift allowance. Sundays are treated as public holidays and shift workers get paid an allowance equivalent to a public holiday allowance.
- 30.2 Relying on the contracts of the applicants the municipality contended that the working hours of shift workers are determined by their department according to duty rosters which are prepared by those departments. A sample of those duty rosters were attached to the answering affidavit.
- 30.3. In 2018, the municipality created a staff establishment where salary scales are attached to a position. The applicants fall under Task Grade 4 where the entry level annual salary is R108 887 at a monthly salary of R9 074. The staff establishment was adopted by council and salaries are paid according to that staff establishment.
- 30.4. This, according to the municipality, is consistent with the provisions of section 66 of the Local Government: Municipal Systems Act of 2000. The municipality denies that it has contravened the provisions of section 33 of the BCEA. According to the municipality all the information requested is contained in the collective agreement applicable to the applicants. It further contends that the applicants are

not paid based on a day's work performed but according to the salary package agreed in their contracts of employment. It further denied that the calculation of the applicants' salaries is based on hours. It contended that salaries are set out in the agreements as a globular figure and not a daily rate. It alluded to the fact that the determination of salaries when staff is put to the establishment is a complex process that involves experts in the human resources department. It further denied that the applicants are underpaid as alleged. The municipal manager denied that the applicants are disadvantaged and contends that they are advantaged as they work 48 hours a week.

30.4. Any change to the remuneration of the applicants would necessitate changes in their contracts of employment. The municipality attached certain payslips of the applicants, a copy of the collective agreement and a schedule of the Task salary scales in support of its contentions. It questioned the authenticity of the rates alleged in the founding affidavit.

#### *Applicants' legal submissions*

[31] Mr Zono submitted that the applicants actually work sixteen days in a month and twelve hours a day. He contended that the municipality is paying the applicants on a wrong formula because it calculates the hours as eight-hours per day instead of twelve hours. Relying on section 33 of the BCEA he submitted that the applicants have a right to be given the information they requested.

[32] He referred the court to **Masemola v Special Pension Appeal Board & Another**<sup>2</sup> for his reliance on the maxim “where there is a right there is a remedy: *Ubi jus, ibi remedium*”, where the court placed reliance on the remarks of Centlivres CJ in **Minister of Interior v Harris**<sup>3</sup>, and stated:

“[51] There can to my mind, be no doubt that the authors of the Constitution intended that those rights [that is, the rights entrenched in the Constitution] should be enforceable by the courts of law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. *Ubi jus ibi remedium*...”

[33] He also relied on **Minister of Interior case**<sup>4</sup> for the submission that, inter alia, want of right and want of remedy are reciprocal. He contended that the payslips that are given to the applicants do not contain the information that they require in these proceedings and for that reason he urged the court to order the municipality to provide such information.

[34] He relied on section 195 (1) (f) and (g) of the Constitution and on section 67 of the Municipal Systems Act 32 of 2000 for the submission that the municipality must ensure fair, efficient, effective and transparent personnel administration. He further submitted that the courts are constitutionally empowered to enforce and apply the law. In this regard, he relied on **Cools Ideas 1186 CC v Hubbard & Another**<sup>5</sup> for the submission where Jafta J stated:

“[99] In our democratic order, it is the duty of courts to apply and enforce legislation . . . . . If the validity of legislation is not impugned, there can be no justification for not enforcing it . . . . .”

[35] He submitted that because the provisions of the BCEA and the Human Resource Management Policies and Procedures together with the Municipal Systems Act 32 of 2000 are not impugned this court must enforce compliance

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<sup>2</sup> 2020 (2) SA 1 (CC) at para 51.

<sup>3</sup> Minister of Interior v Harris 1952(4) SA 769 (A) at 780 H – 781 B.

<sup>4</sup> 1952 (4) SA 769 (A) at 780 H – 781 B.

<sup>5</sup> 2014 (4) SA 474 (CC) para 99.

therewith. He submitted that the actions of the municipality are unlawful and this court has a duty to ensure that the doctrine of legality is upheld. He relied in this regard on ***Lester v Ndlambe Municipality & Another***<sup>6</sup>. Mr Zono persisted in the relief sought in the notice of motion.

#### *Municipality's legal submissions*

[36] Mr Maswazi, on the other hand, submitted that section 33 (1) (g) provides that an employee must be given the following information, if relevant, to the calculation thereof, namely,:

- (1) *the employee's rate of remuneration and overtime rate,*
- (2) *the number of ordinary and overtime hours worked by the employee during the period for which the payment is made,*
- (3) *the number of hours worked by the employee on a Sunday or public holiday during that period.*

[37] It further provides that the information must be given to the employee at the workplace or at a place agreed to by the employee during working hours. He submitted that those provisions are not relevant for the purposes of the issues before this court.

[38] He submitted that the municipality is bound by the staff establishment and that staff establishment must account for remuneration of each post. When the staff establishment was put in place in 2018 and approved by the council, that meant that the employees (the applicants in this case) were given a salary per month in terms of their employment contracts. He submitted that the collective agreement binds the members including the applicants and the unions. The shift allowance is provided for in the collective agreement to be 6% of the

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<sup>6</sup> 2015 (6) SA 283 (SCA) para 23, 24, 27 & 28 thereof

salary. In this regard he referred the court to clause 10.1 of the collective agreement.

[39] He submitted that once that information is contained in the collective agreement it is information that is publicly known to the applicants. He submitted that the case made by the respondent is that the applicants are paid in terms of the task grade not per hour. Once the staff establishment was set up every position was linked to an annual salary and in this regard he referred the court to an annexure "KSD4". The contentions by the applicants, he argued, that they must be given a rate to which they are paid is misplaced because they are not paid according to the rate but according to the salary agreed to.

[40] He further submitted that even the information relating to shift allowance is contained in the payslip. He submitted that section 33 of the BCEA does not apply in this case. He argued that the hourly rate is applicable only where shift allowance is paid.

[41] Mr Maswazi submitted that the applicants failed to make their case in their founding affidavit but attempted to do so in their replying affidavit. In this regard he relied on *Hart v Pinetown Drive – in Camera (Pty) Ltd*<sup>7</sup> and on *Total SA (Pty) Ltd v Nedcor Bank Ltd*<sup>8</sup>. He submitted that no case has been made for the relief sought and for that reason the application should be dismissed with costs.

[42] In reply, Mr Zono submitted that there is a distinction in so far as the applicants are concerned between the remuneration and salary and this case

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<sup>7</sup> 1972 (1) SA 464 (D) at 469 C-E.

<sup>8</sup> [1997] 3 All SA 562 at 567 and also on *Moleah v University of Transkei* 1998 (2) SA 522 (TkH) at 533.

is more about remuneration and less about the salary. He persisted that that rate is important for calculation purposes and it must be shown on the payslip. He persisted in the relief sought by the applicants.

### *Discussion*

[43] First, it is important to note that throughout the application, the applicants referred to 'remuneration or salary'. In argument, Mr Zono focused on remuneration than on salary. The Labour Relations Act 66 of 1995 (the LRA), defines remuneration:

*“means any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State, and “remunerate” has a corresponding meaning”*

[44] In Collins English Dictionary, a salary is defined as *“the money that someone is paid each month by their employer”*, whereas Merriam- Webster defines a salary *“as fixed compensation paid regularly for services.”*

[45] These definitions by their very nature implicate a relationship between an employer and an employee. They also involve services performed.

[46] The applicants request, amongst others, information that relates to the rates upon which their remuneration is based and also for this court to direct the municipality to calculate applicant's remuneration and use the formula that applies to shift workers. They demonstrated that prior to September 2016 rates were reflected on their payslips. Similarly, this relief is directly linked to the salaries of the applicants, an aspect that the parties agreed to in their collective agreement.

[47] The provisions of section 33 of the BCEA read as follows:

*“Information about remuneration*

33. (1) An employer must give an employee the following information in writing on each day the employee is paid:
- (a) The employer's name and address;
  - (b) the employee's name and occupation;
  - (c) the period for which the payment is made;
  - (d) the employee's remuneration money;
  - (e) the amount and purpose of any deduction made from the remuneration;
  - (f) the actual amount paid to the employee; and
  - (g) if relevant to the calculation of that employee's remuneration—
    - (i) the employee's rate of remuneration and overtime rate;
    - (ii) the number of ordinary and overtime hours worked by the employee during the period for which the payment is made;
    - (iii) the number of hours worked by the employee on a Sunday or public holiday during that period; and
    - (iv) if an agreement to average working time has been concluded in terms of section 12, the total number of ordinary and overtime hours worked by the employee in the period of averaging."

[48] The municipality at paragraph 36 of its answering affidavit stated the following:

"36. ...To my knowledge applicants are paid their salaries based on the grading relevant to their positions and not based on a daily rate. In any event I deny that the applicants are disadvantaged, they are in fact advantaged as shift workers, they work one hundred and fifty-six hours a month which translates to 48 hours per week."

[49] To the extent that there is a complaint that applicants work more than the regulated hours and they are not being reimbursed adequately, as alleged, that is a matter that falls squarely within the collective agreement. It relates solely to the remuneration or salary of the applicants and thus puts the issue outside the realm of this court because the parties, as a collective, decided how they wanted to regulate their employer – employee relationship. It is common cause that the parties agreed as reflected in their collective agreement, *inter alia*, that:

"10.2 The following matters shall be the subject of collective bargaining at a national level only:

10.2.1 Wages and salaries;

....

10.2.9. Hours of work" (my underlining).

[50] According to the agreement attached by the respondent belonging to the fifth applicant, the following relevant information is recorded:

*"It is my pleasure to inform you that you have been appointed to the post of Access Control Officer in the Community Safety Department of the King Sabata Dalindyebo Municipality on the*

commencing notch of the salary scale **R 98 268- 99 780- 101 352 – 103 020- 104 640- 105 444- 108 264- 111 144 p.a.** to commence duties on the 1<sup>st</sup> November 2014...

6. *Your working hours shall be from Mondays to Thursdays (8) hours per day from 08h00 to 13h00 and 13h45 to 17h00 and on Fridays from 08h00 to 13h00 and 13h45 to 16h00, which hours you are expected to observe minutely and any absence during these hours shall first be approved by your Head of Department or any official delegated by the Head of Department. Working days and hours of employees who work shifts are as determined by their departments in line with duty rosters prepared for that purpose.*
7. *Your salary amounting to R8189.00 (eight thousand one hundred and eighty nine rand) will be paid monthly by direct deposit into your Bank, Building Society or Post Office account on the 25<sup>th</sup> day of each calendar month except where the 25<sup>th</sup> day falls on a Saturday, a Sunday or a Public Holiday in which case payment shall be made on the last working day before the 25<sup>th</sup>...*
9. *Salaries and wages of permanent staff are reviewed and determined by Collective Agreement at the South African Local Government Bargaining Council (SALGBC) which covers the Local Government undertaking...*
16. *Stand- by, Night work, Sunday work and Public Holiday work allowances are payable at a rate prescribed by Council to employees who ordinarily work night shifts, or who ordinarily on Sundays or Public Holidays and/ or whose duties require that they be on standby."*

#### *Rates relating to shift allowance*

[51] The relief sought, which relates to information to be reflected on the payslip where that information relates to shift allowance, viewed objectively, is that the municipality must do what the law enjoins it to do, namely, to include in the payslips the rates in respect of shift allowances that are paid. It is common cause that that rate is 6% of the employees annual salary and is payable monthly<sup>9</sup>. The applicants accept that the rate of 6% in so far as the shift allowance is concerned was agreed but their complaint is that even that rate is not reflected on the payslip.

[52] Mr Maswazi submitted that the required information is given only if it is relevant. In this regard he relied on the provisions of section 33(1)(g). He submitted that it is not relevant to have that information reflected on the payslip because the employees are appointed according to the establishment.

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<sup>9</sup> Clause 10.1 of the collective agreement.



- [53] The question then is who determines relevance. It cannot be the requestee. The requester knows why it requests certain information. As stated in *Lester*, above: “government should be conducted within a framework of recognised rules and principles which restrict discretionary power”<sup>10</sup>.
- [54] In respect of the shift allowance he contended that the 6% rate is contained in the collective agreement. In annexure “KSD4” which is a payslip of the first applicant, put up by the municipality, next to shift allowance, there is an insertion with a red pen of ‘@ 6%’ next to an amount of R895.86. The insertion in ink is critical because what it demonstrates is that other than the amount of R895.86 there is no way that an employee would know what rate was applied to the hours worked for shift allowance in order for the employer to arrive at the amount of R895.86. It is so that that information is contained in the collective agreement but nothing precludes the employer from placing it on the payslip. In my view, this information must be apparent from the payslip.
- [55] On “KSD 4”, which is the payslip of the first applicant, there are rates recorded therein, such as, a night shift rate, a Sunday or public holiday rate and there are units and adjustments placed next to those items. When it comes to the shift allowance there is no rate, no units or adjustment.
- [56] The response that the employees must have regard to the collective agreement does not answer the question, why is the rate of 6% for shift allowance not reflected on the payslip? It is one thing to agree on a rate but it is another to determine whether that rate is in fact being applied when an employee’s shift allowance is paid.

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<sup>10</sup> Lester, supra, page 296 para 25; See also: Wade & Forsyth, *Administrative Law* 7 Ed (1994) at 24.

[57] When employees make an enquiry orally or in writing, an employer does not have a right to ignore that enquiry only to answer it in court. The enquiry to the employer was not about whether or not there was an agreement on the issue of the shift allowance. The answer given in the answering affidavit is not adequate. The municipality has not proffered an answer why the shift allowance rate is not reflected on the payslips of the applicants, when all those for night shifts, Sundays or public holidays are reflected. I disagree with the submission that the reflection of the 6% of the shift allowance on the payslip is not relevant as envisaged in section 33(1)(g) of the BCEA.

[58] In ***Lester v Ndlambe Municipality***<sup>11</sup>, relied upon by the applicants, Majiedt JA (as he then was) when dealing with the doctrine of legality stated:

*"[26] Local government, like all other organs of state, has to exercise its powers within the bounds determined by the law and such powers are subject to constitutional scrutiny, including a review for legality."* (footnotes omitted).

[59] In an article written by Mr Daniel van der Merwe of the National Collective Bargaining Coordinator dated 9 January 2023 entitled: *"But I worked two Sundays this month – I haven't been paid correctly. The overtime and Sunday pay blunders,"* he stated:

*"To address this, the first port of call is section 33 of the Basic Conditions of Employment Act (BCEA). The section makes it compulsory for employers to provide employees with a payslip which details, amongst other things, the details of the two parties and more specifically the hours worked by the employee including ordinary and overtime, Sunday hours as well as the amount paid for same. Far too often, an employee complains about not receiving a payslip, or even if they have received a payslip, they complain that they have been incorrectly paid for the various hours worked. These relevant hours worked need to be reflected on the employee's payslip to ensure accurate payments are made and to avoid a potential dispute that could arise later. Consequently, employers should ensure not only for the sake of avoiding unnecessary disputes from their employees but for the sake of providing them with those details to ensure that they are compliant with the*

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<sup>11</sup> 2015 (6) SA 283 SCA at page 296 para 26.

*relevant labour legislation that they accurately record and display any overtime or Sunday hours worked on the employees payslip along with the correlating rate or total amount of pay for such hours worked.”*

[60] I accordingly find that there is merit in the complaint raised by the applicants in this regard. The issue that is being enforced is a matter of law and to that extent the courts are enjoined to ensure compliance with the applicable legislation. The refusal to do so, is unlawful. I find that the municipality is obliged to reflect the rate of the shift allowance on the payslips of the applicants. I also find that the rate of the shift allowance is not only necessary but relevant for it to be reflected on the payslips in order for the employees to understand, ascertain and appreciate the correctness of the amounts paid for such allowance. That is, in my view, what the Legislature intended to achieve.

#### *Rate of remuneration*

[61] The second issue is whether the rate of remuneration as it appeared on the payslips attached in reply by the applicants prior to 2018 ranging from 46% to 56.34 %, should be reflected on the payslips, as mentioned above. The applicants contend that these rates must be reflected whereas the municipality contends that there are no rates to be reflected because the parties agreed on a salary package. The municipality as indicated above, submitted in this regard, that it is not possible to include that rate because the applicants have salaries and therefore there is no rate. It also indicated that the process of determination of salaries according to a task grade is a complex one and requires experts in human resources.

[62] Although the applicants attached payslips to their replying affidavit there was no application from the municipality that they should be struck out. There was, of course, a complaint that they were raised in reply against the rule that an applicant must stand or fall by the case made out in the founding affidavit<sup>12</sup>. The municipality did not pursue that objection to the extent of asking this court to disregard them. The municipality had challenged the authenticity of the rates set out in paragraph 10 of the founding affidavit as follows:

**“Ad paragraph 10 and its subparagraphs thereof**

35. *I note that percentages referred to in these paragraphs. I note further that the deponent does not state where she got them from. I am unable to comment on them by virtue of lack of knowledge in respect of the source from whence they come. I deny though that such figures as set out in these paragraphs are authentic.”*

[63] Because the authenticity of the rates were placed in issue, the only opportunity the applicants had to deal with those issues was in their replying affidavit. I do not believe that the applicants would have anticipated that the municipality that issued the payslips with those rates recorded therein, would question their authenticity. I believe that the municipality was mischievous in this regard.

[64] If one has regard to the payslips attached to the replying affidavit (dated for the periods 2014 to 2019), one observes that there are “rate of pay” appearing thereon even though there is a basic salary but no such rates appear on “KSD 4” dated 31 December 2021. However, the nub of the objection by the municipality is that the structure of the contracts of the applicants, since 2018, is such that they are paid their salaries based on the task grade to which they belong. They are not paid based on a day’s work performed but according to the salary package attached which forms part of their contracts.

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<sup>12</sup> *Moleah v University of Transkei* 1998 (2) SA 522 (TkH) at 533.

[65] The municipality further contended that for that reason their remuneration cannot be based on hours worked. There is merit in this objection for two reasons:

- (i) First, section 33 enjoins the employer to give to the employee the information if relevant to the calculation of that employee's remuneration. In *casu*, the applicants and the municipality agreed on a salary as indicated in the appointment letter partially quoted, above.
- (ii) Second, it is common cause between the parties that the terms and conditions of their employment, in particular those relating to salaries, wages and hours of work, are subject to a collective agreement which binds them as agreed in clause 9 thereof. They agreed that any issues relating to the salaries and hours of work shall be subject of collective bargaining at a national level only.
- (iii) Third, there is accordingly no room for this court to interfere with that agreed position. The applicants complain that they are being underpaid. That relates to their salaries and must be referred to collective bargaining as agreed. Courts cannot determine salaries of the applicants, because, first, they are not privy to the contracts of employment between the parties, and second, the remedies and dispute resolution mechanisms available to the applicants in this regard have not been explored. Third, to interfere with the salaries agreed upon would be to undermine the bargaining power that the parties exercised in circumstances where there is no justification for doing so.

[66] In *Ramolesane & another v Andrew Mentis & another*<sup>13</sup>, the Court held:

*“[T]here will inevitably be groups of people, perhaps even fairly large groups of people, who will contend, with justification, that a settlement was against their interests. None the less, because of the principle of majoritarianism, such decision must be enforced against them also.”*<sup>14</sup>

[67] It is for these reasons that in resolving the dispute relating to the rate of pay or remuneration, the version of the municipality is to be preferred. I accordingly refuse to grant the relief sought where such relief relates to the rate of remuneration, number of hours in relation to salary, calculation of the applicant’s remuneration and any order directing the municipality to calculate the applicants’ remuneration or to do retrospective calculations. It follows that the relief sought in paragraph 2 of the notice of motion, in line with my findings will be amended by this court to make reference only to the shift allowance. The relief sought in paragraphs 3, 4 and 5 must accordingly fail.

## **Costs**

[68] Mr Maswazi submitted that if the applicants are to succeed in paragraph 1 and 2 of the notice of motion they will not be entitled to the costs in respect of the other relief they sought. Mr Zono had asked for costs of the application. In the exercise of the court’s discretion on costs, I have had regard to the fact that the applicants, through their attorneys of record, attempted to seek the information in writing before approaching court. That was on 13 October 2021. The correspondence was received on the same day by the municipality and it bears the municipal manager’s stamp. This application was launched on 13 December 2021, some two months later.

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<sup>13</sup> (1991) 12 ILJ 329 (LAC) @ 336 A.

<sup>14</sup> See also: Dr John Grogan: ‘Collective Labour Law’ page 40 where he deals with the principle of majoritarianism.

[69] There is the memorandum from Mr Kettledas which records that these issues were raised with the municipality way back in 2021. This application could have been avoided with ease had the municipality taken a moment to address the concerns of its employees, no matter how irrelevant it thought they were. It failed to do so. It is for that reason that, although the applicants did not achieve substantial success, they should be able to recover a higher percentage of their costs. I intend to allow 80% of the applicant's costs of the application. For the reasons advanced above, I also do not intend to award costs against the applicants in respect of the relief that will be dismissed even though the municipality succeeded in its opposition.

## **ORDER**

[70] In the result I make the following Order:

1. **The respondent's failure to give applicants information in writing about the rate of the shift allowance is hereby declared unlawful.**
2. **The relief sought in paragraph 2 of the Notice of Motion is amended as follows:**

**"The respondent is directed to forthwith take all steps necessary to cause the agreed 6% rate, in relation to the shift allowance, to be reflected on the applicants payslips, every month."**
3. **The relief sought in paragraphs 3, 4 and 5 is dismissed.**
4. **The respondent is ordered to pay 80% of the applicants' costs of the application.**

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**T.V. NORMAN**

**JUDGE OF THE HIGH COURT**

**Matter heard on : 10 AUGUST 2023**

**Judgment Delivered on : 22 AUGUST 2023**

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