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LL Case No 257/1985

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

WORKMEN'S COMPENSATION COMMISSIONER Appellant

and

JOHN PHILLIP CRAWFORD First Defendant

AAF (PROPRIETARY) LIMITED Second Defendant

CORAM: RABIE CJ, BOTHA, GROSSKOPF, JACOBS et SMALBERGER JJA

HEARD: 11 SEPTEMBER 1986

DELIVERED: 30 SEPTEMBER 1986

JUDGMENT

/BOTHA JA ...

BOTHA JA:-

The appellant is the Workmen's Compensation Commissioner, duly appointed as such in terms of section 12 (1) of the Workmen's Compensation Act 30 of 1941, to which I shall refer as "the Act". Pursuant to the provisions of section 8 (1) (b) of the Act, the appellant, as plaintiff, brought an action in the Transvaal Provincial Division against the respondents, as defendants, arising out of an occurrence on 28 April 1977, when one Pieterse sustained serious injuries while working on the premises of Ferralloys Ltd, in the district of Camperdown, Natal. In his particulars of claim the appellant alleged, inter alia, that the occurrence constituted an accident as defined in the Act; that Pieterse was at all material times a workman as defined in the Act; that in terms of the Act the appellant became obliged to pay and did in fact pay compensation in respect of the accident in various amounts,

/totalling ...

totalling R17 046,35; that the said amount did not exceed the amount of damages suffered by Pieterse; that the accident was caused by the negligence of the first respondent, acting within the course and scope of his employment with the second respondent; and that in terms of section 8 (1) (b) of the Act the respondents were obliged to pay the said amount of R17 046,35 to the appellant. In their plea the respondents, broadly speaking, placed all the appellant's allegations that I have mentioned in issue, save for admitting the fact of the occurrence and that Pieterse had sustained serious injuries.

The appellant's allegation that Pieterse was a workman as defined in the Act - which is the only matter directly pertinent to this appeal - was contained in para 5 (ii) of his particulars of claim. Prior to their denial of that allegation in their plea, the respondents had requested further particulars to it; inter

/alia ...

alia, the appellant was requested to state in whose service Pieterse was at the time of the incident and what his annual earnings amounted to, calculated in the manner set forth in section 41 of the Act. The appellant's reply was that Pieterse was employed by Spicer Mitchell (Pty) Ltd and that he earned R130,50 per week. In the minutes of a pre-trial conference (para 7) the parties recorded the following:

> "Subject to the proof that Pieterse qualified in terms of the Act the Defendant admits (sic) the allegation contained in paragraph 5 (ii) of the Particulars of Claim."

What was intended to be conveyed by this statement became clear at the trial: the respondents were placing the allegation that Pieterse was a workman in terms of the Act in issue on the sole ground that his earnings at the time of the accident exceeded the limit laid down at that time in section 3 (2) (b) of the Act, with the result that he fell outside the category of workmen

catered for in the Act. It may be said at once that the issue thus raised by the respondents did not relate to the sum of R130,50 alleged to have been earned by Pieterse per week. It was and is common cause that that was his basic wage at the time of the accident. The issue was whether or not certain payments for over-time work received by Pieterse at the time should have been included in the calculation of his earnings in terms of sections 3 (2) (b) and 41 of the Act, as will be more fully explained below.

The case went to trial before WEYERS J. The appellant led evidence on all the issues and then closed his case. Thereupon application was made on behalf of the respondents for absolution from the in-stance, on the ground that, on the evidence adduced on behalf of the appellant in regard to the remuneration received by Pieterse for overtime work performed by him, no reasonable person could find that he was at the

/time ...

time of the accident a workman in terms of the Act. WEYERS J acceded to the application and accordingly decreed absolution from the instance, with costs. It is against that order that the present appeal is directed, the trial Judge having granted the appellant leave to appeal against it to this Court.

Section 3 (2) (b) of the Act at present reads as follows:

> "3. (2) The following persons shall not be regarded for the purposes of this Act as workmen -
>
> (a) .....
>
> (b) persons whose annual earnings calculated in the manner set forth in section 41 exceed R18 000 or, from a date determined by the State President by proclamation in the Gazette, such higher amount as he may so determine."

It is common cause that at the time of the accident the maximum figure applicable in terms of section 3 (2) (b) was R7 260, instead of the present figure of

R18 000. It is also common cause that a calculation of Pieterse's annual earnings based only on his basic wage of R130,50 per week results in a figure of R6 778, which is below the relevant maximum, with the consequence that, if only his basic wage were to be taken into account, he would have qualified as a workman in terms of the Act. On the other hand, it is common cause once again that, if the overtime payments received by Pieterse, to which reference will be made below, were to be taken into account in the calculation of his annual earnings, such earnings would have exceeded the relevant maximum figure, with the result that Pieterse would not have qualified as a workman in terms of the Act.

Section 3 (2) (b) uses the expression "annual earnings calculated in the manner set forth in section 41". The relevant provisions of section 41 - on which the decision of this appeal turns - are the following:

"41. (1) For the purpose of determining the

compensation payable, the commissioner shall compute the earnings of the workman in such manner as, in his opinion, is best calculated to give the monthly rate at which the workman was being remunerated by his employer at the time of the accident including -

(a) .....

(b) any overtime payments or other special remuneration of a constant character or for work habitually performed,

but excluding remuneration for intermittent overtime and casual payments of a non-recurrent nature, sums paid by an employer to a workman to cover any special expense entailed on the workman by the nature of the work, or any ex gratia payment to the workman, whether given by the employer or any other person."

Later, particular attention will have to be given to the expressions "of a constant character" and "intermittent overtime". But first, it is necessary to consider generally the evidence led on behalf of the appellant at the trial and the approach which is to be adopted to the resolution of the issue in this appeal.

/Two ...

Two witnesses were called to testify for the appellant on the point in issue, Mr H G Fisher and Pieterse himself. Pieterse was called to give evidence concerning the regularity with which he received overtime payments from his employer. He gave details of the periods during which he worked overtime and for which he was paid, over a total period of about 18 months prior to the accident. He also gave evidence generally as to the practice which was followed in regard to overtime work in his relationship with his employer. I shall deal later with his evidence on these matters.

Mr Fisher is employed in the office of the appellant as a senior manpower administrative officer. He was the official in charge of Pieterse's claim for compensation arising out of the accident. He was called to give evidence on the practice and procedure followed in the appellant's office in regard to the calculation

/of ...

of a workman's annual earnings with a view to determining whether or not he qualified as a workman in terms of the Act, with particular reference to the manner in which overtime payments are dealt with. In the course of his evidence he said that in this particular instance the appellant's officials were satisfied that Pieterse was a workman in terms of the Act and that the appellant had "classified" him as such. The determination that Pieterse was a workman in terms of the Act was based on a calculation of his earnings as being R130,50 per week. The information regarding Pieterse's weekly wage, Fisher explained, was obtained from an accident report supplied to the appellant by Pieterse's employer in terms of section 51 of the Act. In that report no overtime payments were reflected under the heading of Pieterse's earnings. Pieterse also submitted an accident report to the appellant, in terms of section 54 of the Act. In his report Pieterse

/reflected ...

reflected his weekly earnings as being R130,50, plus a cost of living allowance of R27,50 (it is common cause that this item can be ignored), plus overtime at R90,00. This latter figure, Fisher testified, was not taken into account in calculating Pieterse's annual earnings, because it was the practice in the appellant's office to base the calculation of a workman's earnings solely on the information supplied by his employer and to disregard any contrary information given by the workman himself. Under cross-examination Fisher was constrained to concede that the question of Pieterse's overtime receipts was not investigated and that it was simply assumed by the appellant's officials, by virtue of the contents of the employer's accident report, that such receipts did not qualify for inclusion in the calculation required to be made in terms of section 41 (1) of the Act. In cross-examination it was also elicited from Fisher that the appellant had received

a letter from Pieterse's employer (exhibit D.4), in which it was stated that Pieterse's average weekly earnings at the time of the accident were R273,86. That letter, however, was received more than two years after the appellant had determined that Pieterse was a workman in terms of the Act. In fact, the letter was written after the appellant had already instituted action against the respondents. It was therefore rightly disregarded by the trial Judge, but I shall have occasion to refer to it again a little later. To round off my summary of Fisher's evidence, it should be mentioned that he was questioned about the practice in the appellant's office regarding the interpretation and application of the expressions "of a constant character" and "intermittent overtime" in section 41 (1) of the Act. In the view I take of the matter, however, it is not necessary to deal with his evidence in that regard.

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In the Court a quo the issue under discussion was approached by counsel on either side and by the trial Judge on the supposition that the Court was free to form its own opinion as to whether or not Pieterse was a workman, with reference to the calculation of his earnings in respect of overtime, on the basis of the evidence placed before the Court, and to give effect to its own opinion thus formed, regardless of the fact that the appellant had already determined that he was a workman. The heads of argument filed by both counsel in this appeal reflected the same approach. The propriety of this approach was broached with counsel during the hearing of the appeal. Counsel for the appellant thereupon promptly submitted that the appellant had exercised a discretion and that the Court was not entitled to interfere with his decision. It is necessary, therefore, to consider this aspect of the matter.

/The ...

The appellant derives his cause of action against the respondents in this case from the provisions of section 8 (1) (b) of the Act, which reads as follows:

> "8. (1) Where an accident in respect of which compensation is payable, was caused in circumstances creating a legal liability in some person other than the employer (hereinafter referred to as the third party) to pay damages to the workman in respect thereof -
>
> (a) .....
>
> (b) the commissioner or the employer by whom compensation is payable shall have a right of action against the third party for the recovery of the compensation he is obliged to pay under this Act as a result of the accident, and may exercise such right either by intervening in proceedings instituted by the workman against the third party or by instituting separate proceedings: Provided that the amount recoverable in terms of this paragraph shall not exceed the amount of damages, if any, which in the opinion of the court would have been awarded to the workman but for the provisions of this Act."

/On ...

On general principles, when the Commissioner exercises the right of action conferred upon him by these provisions, he would be burdened with the onus of proving the prerequisites laid down for liability on the part of the third party. So, for example, he would have to prove what the amount of compensation is that he is obliged to pay under the Act; and in particular, in the context of this case, he would have to prove that the person involved in the accident was a workman in terms of the Act (cf Lichaba v Shield Versekeringsmaatskappy Bpk 1977 (4) S A 623 (O) at 637 B-G). The fact that the third party cannot, by virtue of what is contained in the proviso at the end of para (b) of section 8 (1), be in a worse position when sued by the Commissioner than when sued by the alleged workman himself, could not prevent him from challenging the Commissioner to prove the prerequisites laid down for his liability.

/The ...

The position, according to general principles, in which the Commissioner and the third party find themselves under section 8 (1) (b) is not, in my view, affected by the provisions of section 25 of the Act. Section 25 (1) provides that any decision of the Commissioner on any matter referred to in a number of paragraphs of section 14 (1) shall be final, subject to the further provisions of section 25. The matters referred to include, inter alia, the determination by the Commissioner whether any person is a workman for the purposes of the Act (section 14 (1) (e)) and the decision of the Commissioner on any question relating to the right to compensation, the computation of earnings, and the amount of any compensation (section 14 (1), paras (f) (i), (iii) and (v)). Section 25 (2) (a) gives the right to "any person affected by a decision of the commissioner" to lodge an objection against such decision within 60 days. Subsections (3), (4),

/(5) ...

(5) and (6) prescribe the procedure to be followed in regard to such an objection, and subsection (7) confers on "any person affected by" a decision given in regard to such an objection the right on certain circumscribed grounds to take the decision on appeal or on review to the Supreme Court. In my opinion the Legislature could not have intended the provisions of section 25 to apply to a third party referred to in section 8 (1) (b). Such a third party is not directly "affected" by any decision of the Commissioner; in the normal course of events he would come into the picture only long after the Commissioner's decision had been taken. In Fred Saber (Pty) Ltd v Franks 1949 (1) S A 388 (A) at 395 CENTLIVRES JA observed that

> "... it would appear that only the employee or employer concerned is a 'person affected by a decision' in terms of sec. 25 (2) (a) and (7) (b) and (d) ..."

That remark was made in a different context, but it

/supports ...

supports the view that the expression "any person affected by a decision" in section 25 should be given a limited interpretation. In Sibisi v Trustees Under Natal Act No 9, 1910 1913 A D 77 at 81 DE VILLIERS CJ said:

> ".... the expression 'affected' does not mean remotely, but proximately affected."

That, too, was said in a different context, but in my view that is the meaning which is to be assigned to the word as used in section 25 (cf Ex parte Workmen's Compensation Commissioner: In re Plotkin v Accident Fund 1970 (2) S A 418 (T) at 421 H - 422 C and Wilson v Zondi 1967 (4) S A 713 (N) at 718 A - B). Since a third party in terms of section 8 (1) (b) is not proximately, but only remotely, affected by any decision of the Commissioner, he does not fall within the purview of section 25 (2) (a) of the Act. That being so, it must follow, in my judgment, that the provisions in

/section ...

section 25 (1) as to the finality of any decision of the Commissioner do not apply in proceedings between the Commissioner and a third party pursuant to section 8 (1) (b).

A more difficult question is whether the fact that the Commissioner exercises a discretion in calculating a workman's earnings in terms of sections 3 (2) (b) and 41 (1) has any bearing on proceedings under section 8 (1) (b). That discretion arises from the use of the words "in his opinion" in section 41 (1). In my view those words are not restricted in their operation to the computation of a workman's earnings "in such manner as .... is best calculated to give the monthly rate at which the workman was being remunerated by his employer at the time of the accident"; they govern also what follows in the rest of the subsection, from the word "including" onwards. In particular, in the present context, concepts such as "of a constant

/character" ...

character" and "intermittent overtime" are incapable of precise circumscription, and it seems to me to be in the highest degree likely that the Legislature intended the Commissioner to have a wide latitude to bring his opinion to bear on the application of those concepts to the particular facts of any given case. And that applies, too, in the context of the incorporation by reference of section 41 in section 3 (2) (b). If, then, in that context, the Commissioner has, in the exercise of his discretion, classified a person as a workman in terms of the Act, and in proceedings instituted thereafter under section 8 (1) (b) against a third party the latter puts the Commissioner to the proof of the fact that such a person is a workman in terms of the Act, is the Court hearing the matter free simply to substitute its own opinion for that of the Commissioner, on no other ground than that its own opinion differs from the Commissioner's? I would

/hesitate ...

hesitate to give a positive answer to this question, for to do so could, I consider, lead to anomalous results. Two examples will suffice to illustrate the difficulties that I foresee. The first is based on section 41 (3) ter, which provides as follows:

> "In any case where in the opinion of the commissioner it is not practicable to compute the workman's earnings in accordance with the preceding provisions, the commissioner may determine such earnings in such other manner as he deems equitable, but with due regard to the principles laid down in those provisions."

If the Commissioner exercises his discretion in terms of this subsection, I find it somewhat startling to think that the Court hearing an action under section 8 (1) (b) could upset the Commissioner's decision on the sole ground that its own notion of what is equitable differs from the Commissioner's view in that regard. This is no doubt an extreme case, but in principle the position should be the same where, for example, the

question in issue is whether or not overtime worked is to be regarded as "intermittent". The second example is based on exhibit D.4 in the present case, to which I referred earlier, viz the letter received by the appellant from Pieterse's employer concerning Pieterse's earnings, after the appellant had commenced proceedings against the respondents. It suggests the possibility of information being placed before the Court in evidence, which was not, and which could not reasonably have been expected to be, available to the Commissioner when he made his determination. Where the question involved is a straightforward matter of objective fact, for instance where it appears that the person determined to be a workman was in fact a policeman, or a domestic servant (see paras (a) (iii) and (f) of section 3 (2)), there might be no problem, but I am not at all sure that the Legislature intended the Court hearing a case under section 8 (1) (b) to conduct

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an entirely fresh enquiry, for the purposes of forming its own opinion, on a matter which has clearly been entrusted to the discretion of the Commissioner for decision. It may be that in such a case the Court would be limited, in deciding the issue, to the grounds upon which the exercise of a discretion is ordinarily open to attack by way of review. If that be the true approach, the Commissioner need merely prove that he made his determination in the exercise of his discretion, and it would then be for the third party to establish one of the recognised grounds for interfering with the decision, e g by showing that the Commissioner had not properly applied his mind to the matter, or that his determination was so grossly unreasonable as to justify the inference that he had not properly considered the question he had to decide.

The questions raised in the preceding paragraph were not properly canvassed in argument before this

Court, because counsel had not prepared themselves for argument on that score. Accordingly I would prefer not to express any decision thereon, unless it is necessary to do so. In my opinion, it is not necessary to do so, for the following reasons. It is clear from the manner in which the appellant's pleadings were formulated that he assumed the full onus of proving that Pieterse was a workman in terms of the Act. That was confirmed, in relation to the calculation of Pieterse's earnings, in para 7 of the minutes of the pre-trial conference, which I quoted earlier, and by the fact that the appellant's counsel saw fit to call Pieterse as a witness in order to place before the Court details of his overtime earnings. In his judgment, WEYERS J remarked:

> "It is common cause between counsel that the onus to establish that Pieterse was a workman on a balance of probabilities rests on the plaintiff."

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It was at no time suggested by the appellant's counsel in the Court a quo that the appellant's determination that Pieterse was a workman in terms of the Act played any role in the resolution of the issue by the Court. On the contrary, the manner in which the case was conducted on the appellant's behalf is consistent only with the view that it was accepted on the appellant's behalf that the Court was called upon to form its own opinion on the issue, on the basis of the evidence adduced, and to pronounce thereon accordingly. So, the appellant had chosen his own battle-ground, as it were, and he has no cause for complaint if on appeal the Court declines to move onto a different terrain. This is not a case in which this Court is constrained to decide a point of law and to deal with the appeal accordingly, whatever the position taken up by the parties may have been, on the basis that it is clear that all the relevant facts had been fully canvassed

/(cf ...

(cf Paddock Motors (Pty) Ltd v Igesund 1976 (3) S A 16 (A) at 23 B-G). It is, on the contrary, in my opinion, a case where, if this Court were to accept the belated submission of counsel for the appellant on the point of law raised in argument, it would be wrong to decide the appeal on the basis thereof, for it would run counter to what was common cause in the Court a quo, and if the point had been taken there timeously, whether in the pleadings or otherwise, the possibility cannot be excluded that the respondents' conduct of their case would have been different, for example in relation to the cross-examination of Fisher (cf A J Shepherd (Edms) Bpk v Santam Versekeringsmaatskappy Bpk 1985 (1) S A 399 (A) at 415 B-E). Accordingly I refrain from deciding the questions discussed in the preceding paragraph of this judgment.

After that detour, I now revert to the facts of this case, as they appear from the evidence of

/Pieterse ...

Pieterse. He was employed as a mobile crane operator and handyman, and he was often required to work on construction contracts away from his home base. An analysis of what he said in regard to his overtime work for his employer, reveals the following, by way of summary:

1. Towards the end of 1975 or the beginning of 1976 he commenced work on the site of Ferrometals in Witbank. He worked there for about 3 months. During that period he occasionally worked overtime over week-ends, possibly once or twice every month.

2. He then worked at the site of Highveld Steel, also in Witbank, for a period of 4 months, commencing in March or April 1976. During that period he worked no overtime whatsoever.

3. Thereafter he went to his employer's

/premises ...

premises in Springs, where he worked for about 6 to 8 weeks. While there, he worked no overtime at all.

4. From Springs he went to work at a site called Lime Acres, in the North Western Cape, where he remained from about September 1976 to January 1977 (apart from the period of his holiday during December-January). At Lime Acres he did occasional overtime work over a week-end, but his overtime earnings were not regular, since the contract work was not behind schedule. He did, however, earn overtime pay in every month, even if only for 1 week-end in the month.

5. He then proceeded to work at the factory site of Ferralloys at Cato Ridge. He worked there from 18 January 1977 to 28

/April ...

April 1977, when the accident occurred in which he was injured. During that period he did a lot of overtime because the work was behind schedule. In every month he worked overtime for 3 week-ends, going home for the remaining one. At the time of his accident he had expected to remain at Cato Ridge for some months more, but he could not say for how long. On that contract he would have been required to continue with his overtime work.

6. In general, it was the practice of Pieterse's employer to send its workmen out countrywide to perform work on outside contracts. That, however, did not invariably involve the doing of overtime work. Overtime was required to be done only in cases where the contract work was behind schedule.

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To these facts section 41 (1) must now be applied. For ease of reference I quote again the important words which fall to be considered:

> "..... including -
>
> (b) any overtime payments or other special remuneration of a constant character or for work habitually performed,
>
> but excluding remuneration for intermittent overtime and casual payments of a non-recurrent nature ....."

In the Court a quo WEYERS J, in interpreting these words, relied on the decision of BEADLE J (with MURRAY CJ concurring) in the case of Todd N O v Rhodesian Iron and Steel Commission 1957 (3) S A 743 (S R). In that case BEADLE J interpreted a similar provision occurring in the Southern Rhodesian Workmen's Compensation Act, 1941. Expressing his total agreement with that interpretation, WEYERS J held that the words "of a constant character" did not qualify the words "any overtime payments" (but found that it was not necessary, on the facts, to base his decision in the case on that

view).

In my view, the learned Judge a quo erred. Looking at the wording of para (b), I have no doubt at all that the words "of a constant character" do indeed qualify the words "any overtime payments". That conclusion is inevitable, as a matter of simple logic: the phrase "any overtime payments", by itself, and by the very nature of the subject-matter dealt with, certainly does not involve any concept of being "of a constant character"; therefore, the alternative phrase which is introduced by the word "or", after "any overtime payments", viz "other special remuneration of a constant character", is incapable of constituting in its entirety a real alternative to the preceding phrase; therefore, the word "other" is incapable of governing the words "of a constant character", and must accordingly be read restrictively as qualifying only the expression "special remuneration", thus indicating no

/more ...

more than that "overtime payments" are also regarded as "special remuneration"; and therefore, finally, the phrase "of a constant character" must of necessity qualify both "any overtime payments" and "other special remuneration".

The learned Judge a quo, with respect, misunderstood the reasoning of BEADLE J in Todd's case supra, the crux of which appears at 749 A-E, because he overlooked (as did counsel on either side, throughout this case) one small but vital word which appeared in section 63 (1) (b) of the Southern Rhodesian legislation, but which is not to be found in the corresponding section 41 (1) (b) of our Act: the word "if". The crucial effect of that word will be apparent at once by emphasising it in the following quotation of the relevant part of section 63 (1) (b) of the Southern Rhodesian Act:

"any overtime payments or other special

remuneration if of constant character or for work habitually performed."

(The word "if" appeared also in the predecessor to section 41 (1) (b) of our present Act: see section 50 (1) (b) of Act 59 of 1934.) It seems to me that it was because of the presence of the word "if" that BEADLE J found (at 749 B) that it was clear that either both the expressions "of constant character" and "or for work habitually performed" qualify "overtime payments", or neither does; and it was because he found that the words "for work habitually performed" could not have been intended to qualify "overtime payments", that he concluded that the words "of constant character" equally did not do so (at 749 D). The problems with which BEADLE J grappled, simply do not exist under our section 41 (1), where the word "if" has been omitted. Without that word, there is no difficulty at all arising out of the words "or for work habitually performed": they obviously have no bearing whatever on "any overtime payments" and are

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merely an alternative to "of a constant character" with reference specifically to "other special remuneration". There is no obstacle, therefore, in the way of giving effect to the plainly logical interpretation of section 41 (1) (b) that I mentioned above. Similarly, the problems of surplusage as between section 63 (1) (b) and the rest of section 63 (1) which BEADLE J discussed at 749 E - 750 B, do not arise under section 41 (1) of our Act. There is no doubt a large measure of over-lapping between the concepts expressed positively in para (b) and the concepts expressed negatively in what follows thereafter, but I do not think that that creates any real problems of interpretation.

As observed earlier, concepts such as "of a constant character" and "intermittent overtime" are incapable of exact definition. In argument we were referred to a large number of dictionary definitions of "constant" and "intermittent", and of the corresponding

/expressions ...

expressions in the Afrikaans text of the Act, "gereelde (aard)" and "af en toe (gewerkte oortyd)". For the purposes of coming to a decision in this appeal, I see no point in going to the dictionaries. Indeed, on the view I take of the facts of this case, the outcome of the appeal is so clear that I find it unnecessary to enter upon a discussion of the ambit of the words "constant" and "intermittent" as used in section 41 (1).

WEYERS J held, on the facts, that the overtime worked by Pieterse was not "intermittent", and, on the supposition that "of a constant character" governed "any overtime payments", that the overtime payments received by him were "of a constant character"; and, furthermore, that the position was so clear that no reasonable person could find for the appellant by holding otherwise.

The salient facts which emerge from my earlier

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summary of Pieterse's evidence may be stated as follows:

(1) Over a period of approximately 18 months, Pieterse received overtime payments in each of the last 8 months. In the last 3 of these he worked overtime fairly regularly; in the first 5, occasionally (albeit in every month). Prior to that, he worked no overtime at all for a period of $5^1/_2$ to 6 months altogether. Earlier, at the beginning of the whole period, he had worked overtime occasionally over a period of about 3 months (again, in every month). Thus, for about one-third of the entire period, at one stretch, he did no overtime work.

(2) Generally, he was required to work overtime only when the exigencies of the work he was engaged upon demanded it. In this regard

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I would quote the following two passages from his evidence:

> " En wanneer daar kontrakwerk gedoen moet word, kan dit gebeur of dit kan nie gebeur nie, dat daar oortydwerk betrokke raak, te pas kom? --- Al wanneer ek oortyd gewerk het, is wanneer die werk agtergeraak het.
>
> Sal u nie met my saamstem dat dit maar eintlik in die reël dikwels gebeur het dat 'n spesifieke kontrak agterraak nie? --- Dit is nie dat alle kontrakte agterraak nie, dit is net wanneer jy nie genoeg werksmense het nie ..... Dan vra hulle jou om op 'n naweek te werk ....."
>
> " En as u op kontrakte gewerk het waar u huis toe gegaan het, het u dan oortyd gewerk in daardie tye? --- Nee, nie in die aande nie. Net wanneer die werk agter is, het hulle ons gevra om op 'n naweek te werk, maar dit was nie altyd nie.
>
> Dit was by geleenthede? --- By geleenthede."

On these facts, in my judgment, the view expressed by the learned trial Judge (viz that no reasonable person could find that Pieterse's overtime was intermittent

/or ...

or that his overtime payments were not of a constant character) is wholly untenable. Absolution from the instance should not have been granted.

The appeal is allowed, with costs. The order of the Court a quo granting absolution from the instance, with costs, is set aside, and there is substituted therefor the following order:

"The application for absolution from the instance is refused, with costs."

A.S. BOTHA JA

RABIE CJ
GROSSKOPF JA
JACOBS JA
SMALBERGERJA

CONCUR