ARBITRATION AWARD

Case No: PSCB220-17/18

Date: 24 March 2019

Panellist: Vuyiso Ngcengeni

In the matter between

Hospersa obo Letswalo and others	**1st Applicant**
and	
NUPSWU obo Members	**2nd Applicant**
And	
Department of Health- Limpopo	**1st Respondent**
and	
DPSA	**2nd Respondent**

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DETAILS OF HEARING AND REPRESENTATION

1. This is an award in the arbitration between the 1st and 2nd Applicants and the 1st and the 2nd respondents. The arbitration was held firstly on 08 June 2018, 17th of September 2018 and again on 04 February 2019 at the Department of Health premises in Polokwane, Limpopo.
2. The arbitration was held under the auspices of the Public Service Co-ordinating Bargaining Council ("the Council") in terms of section 24 (4) 24 (5) of the Labour Relations Act, No 66 of 1995 as amended ("the Act").
3. The dispute is about the interpretation and application of a collective agreement – Resolution 1 of 2007 ("the Resolution"). The dispute is about alleged unpaid overtime for about 1200 employees employed by the Emergency Services ("EMS") in the Province of Limpopo. The applicants are employed by the 1st Respondent and are based in various areas within the province of Limpopo.
4. The dispute aroused on June 2017, and it was referred to the Council on the same month. The dispute was then conciliated on July 2017 in which a certificate of non-resolution was issued on the same month and then the matter was referred to arbitration.
5. I received the last closing arguments on 11 March 2019.
6. The 1st Applicant submitted bundles A1 and A2 and the 2nd Applicant submitted bundle B. 1st Respondent submitted C1, C2 and C 3 which are minutes of Limpopo Chamber meetings and C4 which is an award, for reference purposes.
7. The hearing was digitally recorded and I also took notes. The hearing was conducted in English.

ISSUE TO BE DECIDED

8. I am required to determine whether the 1st Respondent correctly interpreted and applied the Resolution when it allegedly averaged the working hours of the Applicants to 173 hours per month, in the absence of a collective agreement in terms of sub clauses 9.3 and 9.5 of the Resolution.
9. The Applicants want the averaging of working hours to 173 per month, based on the 52 weeks per year by the 1st Respondent be declared unlawful and that they must be paid overtime on each hour worked in excess of 160 per month with effect from 01 July 2007.

BACKGROUND TO THE ISSUE

10. The Applicants have on numerous occasions in the past few years been working more than 160 hours per month. Most often, they worked for 173 hours per month.
11. The Applicants' contracts of employment states that they should work 40 hours per week.
12. The Applicants are employed by the 1st Respondent and they were appointed on different dates, some prior to 2007 and some after 2097.
13. The 1st Respondent in 2007 introduced a new shift system that caused the Applicants to work 4 days a week and 12 hours a day totalling 48 hours a week.
14. The 1st Respondent averaged the working hours based on 52 per year to 173 hours per month and only hour/s in excess of 173 per month is paid as overtime.
15. The parties conducted an inspection in loco on 27 July 2018 to ascertain the number of hours actually worked and the hours being paid as overtime by the 1st Respondent. However, such a process was not concluded.

SURVEY OF EVIDENCE AND ARGUMENT

Risimati Chabalala (Chabalala) from NAPSWU testified as follows:-

16. He is employed as a Labour Relations Officer by NPSWU and has been in that position for three years.
17. The dispute revolves on whether or not the 1st Respondent implemented the Resolution *correctly. He referred to the objectives of the Resolution on page 23 of bundle B, clauses 1.8 and 1.9 and 9.3;*

    "1.8 To provide for the alignment of the public service with the requirements of the Basic Conditions of Employment Act, 1997 and matters incidental thereto.

    1.9 To provide for processes to review certain existing terms and conditions of employment".

    9.3 – *Maximum overtime hours "the mechanisms and conditions for the averaging of maximum overtime hours shall, where required, be determined in the respective sectoral bargaining councils. This excludes employees on commuted overtime.*
18. The Applicants are Emergency Services Personnel or Care Officers, and they do not receive commuted overtime.
19. Clause 9.5 means that in the absence of a Collective Agreement as required by this Resolution, the 1st Respondent was not supposed to have done the averaging of overtime and working hours. Clause 9.5 reads- *"The mechanisms and conditions for the*

averaging of working hours shall, where required, be determined in the respective sectoral bargaining councils."

20. The Basic Conditions of Employment Act of 1997 as amended ("BCEA") alignment referred to in s12 on page 47 of same means in the absence of a Collective Agreement, the 1st Respondent cannot average the overtime and working hours. Section 12(1) of BCEA reads *"Despite sections 9(1) and (2) and 10(1)(b), the ordinary hours of work and overtime of an employee may be averaged over a period of up to four months in terms of a collective agreement."*
21. The reality is as the Public Health and Social Development Sectoral Bargaining Council ("PHSDSBC), there is no Collective Agreement as envisaged in s12 of the BCEA in conjuction with clause 9.3 and 9.5 of the Resolution and as a result, any argument by the Respondents that it has complied with same should be dismissed.
22. In the absence of a Collective Agreement, the employment contracts must take precedent. A reference was made to clause 2.3 of such on page 19 of same- *"Working hours: 40 hours per week".* This forms the basis for the Applicants that they work 40 hours per week and anything in excess of that should be overtime. Since the Applicants are remunerated on a monthly basis, the 40 Hours would be multiplied by 4 and that would amount to 160 hours.
23. He referred to the table on page 5.3 which is the minutes of the Limpopo Chamber held on 23 August 2017. It is not the Applicants who say that any hours in excess of 160 per month must be paid as overtime, the 1st Respondent says so as per the chambers' decision (minutes).
24. He referred to page 45. All these points point to one thing and that is the Respondent did not comply with the Resolution as per their decision and that of the Chamber which say any hours in excess of 160 per month must be paid as overtime.
25. Under cross examination - The averaging of working hours was supposed to be done at a national level. The dispute is not on formulas, it is about clause 9.3 and 9.5 and the Respondent was not supposed to average the working hours in the absence of the Collective Agreement. The Respondent circulated a document that spoke to a roster that is about the hours equalling 168 hours per month, which indicate that 8 hours would be remunerated as overtime and that is corroborated by the shift roster he referred to earlier. Agrees that pages 40-41 is a proposal, but it came as a response to the Applicants complaints that they were being cheated. The moment the Respondent agrees that it has done an averaging of working hours, that is a violation of the Resolution and it is wrong. A definition of a week is clear from the BCEA, referred to page 49. Referred to clause 5.1 and 5.1.4. The Respondent at first wanted to implement the roster, it then wanted to look at others and those are the tricks. The Respondent at first promised to pay the Applicants and later took away that promise and came with

something else that is dishonesty. The Applicants should work 40 hours per week and multiplied by 4 to make 160 hours per month, and anything in excess of that is overtime. He disputes that the parties should get into technicalities of a month being made by little more than 4 weeks.

26. **Arguments-** There was no Collective Agreement from the relevant sectoral bargaining council when the averaging of hours and overtime were made. Therefore, the averaging of hours by the 1st Respondent was unlawful as the Resolution is still effective since the 1st of July 2007. In the absence of a Collective Agreement, the 1st Respondent was supposed, when determining working hours and overtime, have relied on the employment contracts that state that Applicants were to work 40 hours per week. Any

Nhlanhla Mtize (Mtize) of HOSPERSA testified under oath as follows-

27. He is employed as a Labour Relations Practitioner by HOSPERSA.
28. It is common cause that the Applicants have to work 40 hours per week. The BCEA makes provision for a 45 hours week where there is an agreement and in this case, the Applicants working 40 hours a week as per their contracts on p19 of bundle B. Clause 9.5 of the Resolution agrees with the BCEA, and that notwithstanding, the 1st Respondent went on and averaged working hours.
29. Referred to p20-22 of A1 (shift roster), the 1st Respondent calculated the salaries based on 173 hours, which is based on a 12 months period, against the BCEA. As per the roster, the Respondent is paying the Applicants 19 hours overtime. That means the Applicants are not paid 13 hours as they work 192 hours and that is 32 hours in excess of 160. This cannot be correct as there is no Collective Agreement. The discussions on this matter have been going on for a long time and there is a draft agreement on p43 of B, which is still not signed.
30. In the absence of a Collective Agreement, it means the 1st Respondent cannot, in terms of the BCEA average hours as well as in terms of the Resolution, clause 9.5 and the Departmental circulars. So the refusal by the Respondent to pay overtime in the absence of a collective agreement is incorrect.
31. Reference was made to p1 of A2. The Respondent is being inconsistent as some employees are paid any hours in excess of 173 per month as overtime and others not paid as such, and that is caused by the fact that there is no Collective Agreement in place.
32. Under cross examination – the purpose of the audit they conducted was to identify the overtime hours worked and the purpose of page 1 of A2 is to show that the system is inconsistent when paying overtime. Agrees that there is a deadlock on the matter as per clause 5 of p31 (A) and that there is no Collective Agreement. The 1st Respondent's calculations which it says are based on logic are incorrect as they only provide an advantage to it, and not to the Applicants. It is clear that an employee who works 40

hours a week would work 160 hours a month, based on a 4 weeks period. The 192 hours on p20 is calculated on a 4 weeks period, not per month. Clause 6 of same is wrong as the Respondent averaged the hours without a Collective Agreement. The parties deadlocked on 08 December 2017 and the circular was out on 12 December 2017, the Respondent then seized to engage on the matter pending this referral. The Respondent should have stopped the averaging at the time there was a deadlock, yet it continued with it.

33. **Arguments** - It is our humble submission that our members were subjected to unfair treatment and also they were financially prejudiced financially emotionally and morally by the conduct committed by the Respondents while the Respondent and their services were not hindered but were carried out in full by our members while subjected to this unfair conduct of averaging of hours without following provisions, which resulted to the respondents interpreting the provision of Resolution 1 of 2007 incorrectly. In **Apollo Tyres SA v NUMSA (20012)6 BLLR 544 (LC)**, it was held that a change in shift patterns does not constitute term and conditions of employment for the purpose of section 23(1)(c) of the LRA, unless they are contained in a contract of employment or Collective Agreement.

34. I humbly submit that when interpreting sub-clause 9.5 one cannot ignore the main objectives of the PSCBC Resolution 1 of 2007 which is to bring the conditions of employment in the public service within the ambit of the BCEA. Sub-clause 9.5 and other provisions of clause 9 dealing with overtime, appears under the heading of the BCEA, which makes it clear that the intention was to deal with overtime and the averaging of hours in accordance with the BCEA. It is clear that s12 of BCEA requires a Collective Agreement to be concluded for the averaging of hours. A unilateral action to average the hours without the said agreement is in contravention of the said section.

35. The mechanism and conditions for the averaging of working hours shall, where required be determined in the respective bargaining council, in this case the Respondents discovered it was required for the working hours to be averaged and took it upon themselves to average the hours without a Collective Agreement with the unions and without the advice form the Council which led to the unfair labour practice which affected the applicants due to the respondent's failure to interpret the provisions of Resolution 1 of 2007 clause 9,mainly sub-clause 9.5.

36. It is our humbly submission that the respondents decided to intentionally defend a case which they knew very well that they do not have a defence and that their defence was vexatious and frivolous. The commissioner should consider the provision of section 138(10) of the LRA and consider the requirements of law and fairness and should consider the costs against the Respondents and that will serve the purpose of justice and the reason the matter to have taken years to resolve and ended up in arbitration

defeated the purpose of labour relation of speedily resolution of labour matters which was caused by the Respondent.

Respondent's case

Philip Kruger (Kruger) testified as follows:-

37. He is employed as a Chief Director – Clinical Support Services. He has acted in this position for a number of years before he was appointed on August 2015.
38. He has a direct management responsibility to the EMS, amongst others.
39. The dispute is about the working hours and the overtime calculation and he became aware of it around May 2017. They explained the calculation of hours and they also used emails, memos, and Circulars with the Applicants as well as at the Chamber level.
40. He made reference to a circular on p30-31 of A1 which was meant for organised labour and all EMS employees written by him, which was triggered by the fact that his office was inundated with various overtime enquiries and they took a decision to clarify the matter.
41. With "deadlock" in the circular, he meant that he was in constant disagreement with the employees, as the employees were saying a month means 160 hours, and he was not in agreement with that.
42. Noting that the Applicants appointment letters talk of a 40 hour week which when multiplied by 4 would be 160 hours, that is 28 days and only February has 28 days.
43. In the absence of a Collective Agreement, they made a calculation and agreed on 173 hours per month and that was in 2005. In a calendar year, there is 52 weeks x 40 / 12 months = 173 hours per month. Since overtime is performed during a month and salaries paid on a monthly basis, then hours in excess of 173 hours would be paid as overtime. This is based on the Applicants contracts of employment and the number of weeks in a year.
44. They have also looked at various shifts patterns on a 4 months basis and they lead to 173 hours, and this coincides with all months as each month has 4.2 or 4.3 weeks, except February. In instances where an employee works less than 173 or 160 hours per month, such an employee is not penalised by the Respondent.
45. At the National Bargaining Chamber, this issue has been tabled by the Respondent but it has not been dealt with as such.
46. During cross examination – any communication that comes from his office represents the Respondent. Communication was done with labour representatives, not the employees. He found the 173 hours per month to be based on sound logic and made sense. The first preference would have been a Collective Agreement at the Council. It was not wrong to average the hours as there was gap created by the absence of a Bargaining Council agreement. He did not comment on whether did the department fail

to review the averaging when it had the opportunity to do so after 2007. He is aware of the decision on page 17 and 18 of B. The calculation was done by the Respondent and there is no determination that guided the department on the averaging, and this is where the parties deadlocked. He does not believe that there is a document that speaks to the number of hours per month as the Applicants contracts speak to a number of hours per week. Agrees that any hours in excess of 160 in a 4 weeks cycle amount to overtime. The status quo is that employees work 40 hours per week and 173 hours per month.

Thomas Madongwazi Ngobeni (Ngobeni) testified as follows:-

47. He is an Assistant Director – Human Resources in Emergency Services and is aware of the dispute at hand.
48. The Respondent and the organised labour have a disagreement between 160 and 173 hours per month as normal working hours. A task team was put in place to look at the matter and it met two or three times and came up with a sample of hours to illustrate whether were some employees owed overtime pay by the Respondent or not.
49. Reference was made to page 54 of A2, they decided to look at a period of twelve months starting from June 2016 to May 2017, and together collected data and at the end, it became clear that payments made exceeded the actual hours worked and as such, there were overpayments.
50. The Respondent is paying the Applicants as per the Resolution. The Respondent has not recovered the 12 hours overpaid for 2015/2016.
51. The dispute is not about averaging of working hours, it is about payment of overtime. They used the Basic Conditions of Employment Act of 1997 as amended ("BCEA") to average the working hours and they have not violated that.
52. On cross examination – When they talk about averaging, they talk about determination of working hours. The task team was put in place to verify whether the employees were being correctly paid. The task team did not make recommendations, it disintegrated before it could conclude its job because once the 1st Applicant realised that there were no hours owed to them, they abandoned the process. The Applicants work according to the roster and do not always work 40 hours per week. He disputes that the reason for the 1st Applicant members to abandon the process was because they could not agree on how many hours are being worked by the employees. The averaging of working hours was not done in consultation with the Applicants. Agrees that they did not comply with clause 1.8 and 1.9 of the Resolution as well as 9.3 and 9.5.Agrees that there was a need for a collective agreement and for averaging of working hours and it was not done. Agrees that in the absence of a collective agreement, the only document to work on is the contracts of employment, and the contracts states that employees will work 40 hours per week, not per month. It is not correct to say that a month is 4 weeks multiplied by 4

as a month is 4.3 weeks. Agrees that the proposed roster on page 40-41 of B could have resolved the impasse. He is of the view that a collective agreement can better what is prescribed in the BCEA. There is nothing the Resolution that says in the absence of a collective agreement, the Respondent can use the BCEA to average working hours, and by so doing, it did not disadvantage the employees.

53. **Arguments -** It is the Respondent's case that on a proper interpretation of clause 9.5 of the Resolution, the absence of such determination does not prevent the determination of a shift system and the calculation of working hours by an employer as, to conclude otherwise will lead to absurd results unintended by the Resolution. Clause 9.5 deals with the averaging of working hours and provides that: *"The mechanisms and conditions for the averaging of working hours shall, where required, be determined in the respective sectoral bargaining council."* On a plain reading of the clause, mechanisms and conditions used for the averaging of working hours shall be determined in the respective sectoral bargaining council. The general rule is that in interpretation of statutes, the words used in a statute are to be given their ordinary grammatical meaning unless they lead to absurdity. The Supreme Court of appeal in Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) held the following with regards to the proper approach to interpretation: *"Interpretation is the process of attributing meaning to the words used in a document . . . having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence . . . consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production."* The court went on to state that the process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. This approach is consistent with the dictum of the Constitutional Court in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC) that *"the emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous. The inevitable point of departure is, accordingly, the language of the provision itself read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*

ANALYSIS OF ARGUMENTS;-

54. In the case of **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)** *"it was held that the present state of law can be expressed as follows:*

interpretation is the process of attributing meaning to the words used in a document having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances must be given to the language used in the coming into existence consideration must be given to the language used in light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which is directed and the material known to those responsible for its production, the process is objective not subjective"

55. It is trite law that for a dispute of an interpretation of a collective agreement to exist, it is required that at a minimum level there should be a difference of opinion about what a provision of the agreement means and a dispute about the application thereof requires that at a minimum, a difference of opinion about whether it can be invoked should exist.
56. It is common cause that the Applicants' members work on a shift system and that the hours they work vary on a month to month basis. It is also common cause that the Applicants' members' contracts of employment stipulate that they should work 40 hours per week. Furthermore, it is not in dispute that the Applicants' members only get paid overtime when one has worked for an hour /s in excess of 173 hours per month that makes 173 hours the maximum ordinary hours that they are expected to work. The Applicants' members do not get penalised when they worked for less than 173 hours.
57. Further, it is not in dispute that there is no Collective Agreement for the averaging of working hours in terms of the clause 9.3 and 9.5 of the Resolution, despite the fact that the parties agree that there is need for one.
58. The Applicants stated that in the absence of the Collective Agreement in terms of the Resolution, clauses 9.3 and 9.5, their contracts of employment is the only document on which to rely and as such, their contracts of employment state that they must work 40 hours per week. This, the Applicants further stated, results in 160 hours per month, as they multiply one week by four.
59. The Respondent submitted that a month is not made of four weeks, with the exception of February, a month is made of four weeks and two or three days and that makes 173 hours.
60. Chabalala referred to table 5.3 on page 17 of B in the minutes of Limpopo Chamber dated 23 August 2017, a decision was taken- *"To implement the EMS roster system of a hundred and sixty (160) hours, over a four (4) week period, thirteen (13) cycles per annum with eight (8) hours worked beyond the 160 hours being overtime".*
61. Chabalala disputed that the parties should get into technicalities of a month being made by little more than 4 weeks.
62. Mtize mentioned that the 1st Respondent calculated the salaries based on 173 hours, which is based on a 12 months period, against the BCEA. This cannot be correct as there is no Collective Agreement.

63. Kruger submitted that the dispute is about the working hours and the overtime calculation. Noting that the Applicants' members' appointment letters talk of a 40 hour week which when multiplied by 4 would be 160 hours, that is 28 days and only February has 28 days. He further submitted that in the absence of a collective agreement, they made a calculation and agreed on 173 hours per month. In a calendar year, there is 52 weeks x 40 / 12 months = 173 hours per month. Since overtime is performed during a month and salaries paid on a monthly basis, then hours in excess of 173 would be paid as overtime. This is based on the Applicants' contracts of employment and the number of weeks in a year. He said that the calculation was done by the 1st Respondent and there is no determination that guided the department on the averaging, and this is where the parties deadlocked.

64. Ngobeni stated that the dispute is not about averaging of working hours, it is about payment of overtime. During cross examination, he stated that the averaging of working hours was not done in consultation with the Applicants. He Agreed that they did not comply with clause 1.8 and 1.9 of the Resolution as well as 9.3 and 9.5 and also that there was a need for a collective agreement and for averaging of working hours and that was not done.

65. It appears to me that the 1st Respondent has mistaken the dispute as being that of the calculation and payment of overtime only, outside of the provisions of the Resolution on the one hand, and on the other hand, it agrees that it has averaged the working hours. Kruger submitted that it was not wrong to average the working hours as there was a gap created by the absence of a Collective Agreement. Ngobeni mentioned that they used the BCEA to average the working hours and they have not violated the BCEA. Ngobeni agreed that in the absence of a Collective Agreement, the only documents to work on are the Applicants' members' employment contracts.

66. It is therefore clear that the 1st Respondent has averaged the working hours and that is not in compliance with the Resolution, clauses 9.3 and 9.5. Ngobeni's submission that they averaged the working hours in accordance with the BCEA is not sustainable, as s 12(1) of the BCEA also states that averaging of working time shall be done in terms of a Collective Agreement. Therefore the averaging done by the 1st Respondent does not comply with the BCEA either.

67. The Respondents argued that on a proper interpretation of clause 9.5 of the Resolution, the absence of such determination does not prevent the determination of a shift system and the calculation of working hours by an employer as, to conclude otherwise will lead to absurd results unintended by the Resolution.

68. When interpreting collective agreements arbitrators should follow the judgements of the **LAC in the matter between North East Cape Forest v SAAPAWU & others (2) [1997](18) ILJ (LAC)** The court held that:

... A Collective agreement is a written memorandum which is meant to reflect the terms and conditions to which parties have agreed at the time they concluded the agreement. The courts and arbitrators must therefore strive to give effect to that intention. Thus, the courts frequently apply the' parole evidence rule' that is that evidence outside the written agreements itself is not generally permissible when the words of the memorandum are clear when interpreting collective agreements.

69. I do not share the same understanding as the Respondents for the mere reason that a collective Agreement represents a memorandum agreed to by the parties and it is clear to me that the parties foresaw the possibilities of different shift systems in the various state departments, hence they made a provision for that when required (my emphasis).The 1st Respondent's witnesses did not dispute that there indeed is a requirement for the Collective Agreement in terms of clause 9.5. It is my view then that such a Collective Agreement can only be the legitimate mechanism to average the working hours and to bypass that would not be in accordance with the Resolution and its objectives.
70. The averaging of working hours by the 1st Respondent does not comply with the Resolution, clause 9.3 and 9.5.
71. The Applicants members are entitled to work in accordance with their contracts of employment, which is 40 hours per week and the overtime to be remunerated in terms of the Resolution.
72. In the absence of the Collective Agreement, the Applicants members submit that the 1st Respondent should rely on their contracts of employment, and by so doing, it would pay any hour/s in excess of 160 per month as overtime. Well, I differ with this definition of a month by the applicants as a month is defined in s 35 of the BCEA on Calculation of remuneration and wages is stated as *"An employee's monthly remuneration or wage is four and one-third times the employee's weekly remuneration or wage, respectively".* The parties are in agreement that 160 hours are the requisite total within four weeks and that is in terms of the Applicants' members contracts of employment.
73. Hospersa has asked for costs against the Respondents on the basis that they deliberately caused the delays and that they knew from the onset that they did not have a case.
74. On the issue of unnecessary delay, it was on the 21st of February 2018 when I was first seized with this matter and on that day, I dealt with the application of the 2nd Applicant to be joined into this dispute as well as the 2nd Respondent. The parties were not ready to proceed and I ordered them to do a pre-arbitration in my absence. On the 8th of June 2018 when the matter was again set to be heard, I discovered that they had not done the pre-arb, and we then did the pre-arb in the hearing. The Applicants had not finalised their bundle of documents, which would have been expected as they had not done the

pre-arb. Because of that, the Respondents had not prepared any bundle as they awaited the Applicants'. I then ordered them to prepare and exchange such before the next date of set down (17th of September) which they did. It is only on the 17th of September 2018 that the matter duly started in terms of evidence. That makes it clear to me that the Applicants themselves have partly contributed to the delay and I afforded them the opportunity to prepare and be ready for the matter. I therefore do not believe that it would be in the interest of justice to award costs against the Respondents.

75. Although the parties conducted an audit process in an attempt to crunch down the numbers and ascertain how many hours may be owed and to whom, such an exercise failed. As such, I have no clue as to whether are there actual hours owed and the parties would need to undertake the same verification exercise and only if they cannot agree on what constitute overtime, based on the 40 hours a week / 160 hours in four weeks operations, then they may refer a dispute in to the relevant forum for resolution.

AWARD

76. The Respondents have failed to interpret and implement clause 9.3 and 9.5 of the Resolution correctly when they averaged the working time for the remuneration of overtime for the Applicants' members in the absence of a Collective Agreement.

77. The Respondents are to stop using the said averaging of hours with immediate effect and use the Applicants' contracts of employment as the basis for the calculation and remuneration of overtime.

Commissioner / Panelist
Vuyiso Ngcengeni