# IN THE LABOUR APPEAL COURT OF LESOTHO

In the matter between:

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| **MAPASEKA RANTSANE** | **1ST APPELLANT** |
| **SEITEBATSO CHAKA** | **2ND APPELLANT** |

And

| | |
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| **SHOPRITE CHECKERS (PTY) LTD** | **RESPONDENT** |

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# JUDGMENT

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**Coram** : His Honour Judge Keketso Moahloli (a.i)

**Assessors** : Mr S. Kao

Mrs L.T. Ramashamole

**Judgment** : 21 March 2018

## SUMMARY

*Labour law – claim for underpayment of wages – whether monthly paid part-time employee who works 100 hours per month entitled to be paid full basic statutory minimum wage paid to full-time worker who works 195 hours per month – Labour Code and Wage Order provisions unclear – Where there is ambiguity section 4 (c) of Labour Code gives courts statutory mandate to use ILO Conventions and Recommendations in interpretation – Meaning of ambiguity – Part-time Work Convention No.175 of 1994 employed to resolve the ambiguity –* ***Pro rata temporis*** *principle applied*

# ANNOTATIONS

**Cases:**

Coertzen v Gerard NO & Another 1997 (2) SA 836 (OPD)

Equity Aviation Services (Pty) Ltd v SATAWU & Others [2009] 10 BLLR 933 (LAC)

Ex parte Slater, Walker Securities (SA) Ltd, 1974 (4) SA 657 (WLD)

General Life Assurance Co v Moyle 1919 AD 1

Irvin & Johnson v CCMA & Others [2006] 7 BLLR 613 (LAC)

Jaga v Dönges 1950 (4) SA 653 (A)

Lesotho Public Service Staff Association v Ntsoaole & Another 2015 LSLAC

Mangope v Shoprite Checkers (Pty) Ltd, unreported DDPR Case No. A0560/13

Media Workers Association of South Africa & Others v Press Corporation of South Africa Ltd ("Perskor") 1992 (4) SA 791 (AD)

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

NUMSA v Bader Bop (Pty) Ltd (2003) 24 ILJ 305 (CC)

National Union of Mineworkers & Another v Commission for Conciliation, Mediation and Arbitration & Others (2015) 36 ILJ 2038 (LAC)

University of Cape Town v Cape Bar Council 1986 (4) SA 903 (A)

**Statutes:**

Labour Code Order No. 24 of 1992

Labour Code Wages (Amendment) Order, 2007 [LN 169 of 2007]

Labour Code Wages (Amendment) Order, 2008 [LN 158 of 2008]

Labour Code Wages (Amendment) Order, 2009 [LN 169 of 2009]

Wages Order, 1994 [LN 60 of 1994]

Wages (Amendment) Order, 1995 [LN 109 of 1995]

**ILO Conventions and Recommendations:**

Minimum Wage Fixing Convention, 1970 (No.131)

Minimum Wage Fixing Convention, 1970 (No.135)

Part-Time Work Convention, 1994 (No.175)

Part-Time Work Recommendation, 1994 (No.182)

**Other ILO and kindred documents:**

ILO, 1992, *"Minimum Wages: Wage-fixing machinery, application and supervision"*.

[General Survey of the Reports on the Minimum Wage-Fixing Machinery Convention (No.26) and Recommendation (No.30), 1928; the Minimum Wage-Fixing Machinery (Agriculture) Convention (No.99) and Recommendation (No.89), 1951; and the Minimum Wage-Fixing Convention (No.131) and Recommendation (No.135), 1970. Report III (Part 4B) of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution), International Labour Conference, 79th Session, 1992].

ILO, 2011, *"Working time in the twenty-first century"*.

[Report for discussion at the Tripartite Meeting of Experts on Working-time arrangements (17-21 October 2011, Geneva)]

ILO, 1996-2018, "Minimum Wage Policy Guide". [available at www.ilo.org/minimumwage]

The Council of the European Union, Council Directive 97/81/EC of 15 December 1997

[concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC]

**Books and articles**

Beaudonnet & Teklé (Eds). **International Labour Law and Domestic Law:** A training manual for judges, lawyers and legal educators. 2nd ed., ITCILO, 2015

Christo Botha. **Statutory Interpretation**. Juta 2012

Halton Cheadle, *"Reception of international labour standards in common-law legal systems"*, in Le Roux & Rycroft (Eds) **Reinventing Labour Law**. Juta 2012

Gravel & Delpech, *"International labour standards: Recent development in complimentary between the international and national supervisory systems"*, 2008 (147) 4 International Labour Review 403-415

Grogan. **Labour Litigation and Dispute Resolution**. 2nd ed., Juta 2014

Kellaway. **Principles of Legal Interpretation of Statutes, Contracts and Wills**. Butterworths 1995

Myburgh & Bosch. **Review in the Labour Court**. LexisNexis 2016

Thomas, Oelz & Beaudonnet, *"The use of international labour law in domestic courts: Theory, recent jurisprudence and practical implications"*. [available at www.researchgate.net]

## Moahloli AJ

## INTRODUCTION

**[1]** This is an appeal against the judgement of the Labour Court (LC/REV/67/2011), in terms of which the arbitration award of the Directorate for Dispute Prevention and Resolution ("the DDPR") [C092/2010], was set aside on review. The DDPR had found in favour of the dismissed employees ("the appellants") and ordered their erstwhile employer ("the respondent") to pay them the shortfall of their wages resulting from the employer paying them less than the monthly wage prescribed in the 2007-2009 minimum wage orders. The Labour Court set aside the award and remitted the matter to the DDPR to be heard *de novo*.

## BACKGROUND

**[2]** The Appellants were employed by Respondent as "Key-Timers" on 26 April 2006 and dismissed in April 2010. For convenience the provisions of their contracts of employment having a direct bearing on this appeal are set out below, with emphasis added:

> **"OFFER OF EMPLOYMENT: KEY-TIMER**
>
> We set out below the terms of an offer of employment as a permanent Key-timer. Should you wish to accept this offer, you must place you (sic) signature at the end of this letter, confirming your acceptance of all the terms and return it to you Line Manager.
>
> **1. Position and Duties SAP Pos No: …….**
> You will be employed on a flexible basis upon the terms set out in this agreement
> As a Key Timer you:
>
> - are employed on a basis of total job and working hours flexibility;
> - agree to work or relieve in any occupation, section or department for a period or periods of time decided by management at any time;
> - agree to work variable hours, whether daily or weekly, as scheduled by management from time in its discretion;
> - agree to be paid variable rates in accordance with the scheduled occupation

Any failure or refusal by you to comply with an instruction to perform any work or duty within this branch or at another branch will constitute a material breach of this contract, which may then be terminated by management.
Your duties may include assisting with stocktaking. This work may be done in the branch where you work or in another branch.
Your Line Manager will explain your full duties and other aspects of your appointment to you.

**2. Remuneration**

You will be remunerated al the hourly rate, which applies to the specific occupation for which you have been scheduled or in which you have been instructed to work from time to time, unless otherwise decided by management in its discretion.
Your remuneration will be payable monthly in arrears, by cheque or by direct transfer into your bank account. The method of payment will be at the Company's discretion
You will be paid your normal hourly rate of pay as provided for in 2.1 above for any work scheduled and worked on a Sunday.
You will only be paid for actual hours scheduled and worked.
Overtime will only be paid in respect of those hours scheduled by management and worked by you beyond any statutory limit on working hours as may apply to your employment from time to time.

**3. Benefits**

You will be entitled to the company benefits as out in the attached schedule which are specific to this contract, and which will be apportioned according to your hours of work and the level of remuneration earned, where appropriate. Should you require further details in this regard you should contact your Personnel Manager.

**4. Period of Employment and Probation**

Your employment as a permanent Key Timer will commence on …….
During the first six months of your employment, your work performance and general suitability for employment within the company will be assessed. Should you not meet the required standards your employment may be terminated.

**5..Hours of work**

You will work a minimum of 100 hours at rates of pay as per 2.1 above during each month, provided that:

You have been available to work the shifts as scheduled for up to seven days per trading week, including Sundays and public holidays throughout the month.
The branch where you are required to work is operating under normal commercial trading conditions in respect of any relevant month.

The minimum 100 normal hours will be reduced proportionately to take account of:
any scheduled hours where the Key Timer is absent and where payment is accordingly not due (i.e. hours of unauthorised leave of absence, unpaid leave or unpaid sick leave);
any other period of hours not worked due to circumstances beyond the Company's control.
The minimum 100 normal hours will be reduced by 8 hours for every day that the hour-timer is unavailable for scheduling. Notwithstanding this provision the Company reserves its rights to take any appropriate disciplinary action in regard to absence and/or unavailability.

It should be noted that due to operational requirement:

You will not be required to work more ordinary hours in any day than the statutory maximum hours applicable to your employment from time to time, including any extension of ordinary hours contemplated in any appropriate statute from time to time. Your working hours may vary on any day during any week and may be scheduled at any time or times during the trading week at the discretion of management. This may include evenings and/or night work, and work on Public Holidays. Your Rest Day will not normally be a Sunday
……
……

**16. Wage Regulating Measures/Collective Agreements**

Your conditions of employment are subject to the provisions of any applicable law, which may regulate your employment from time to time.

Your terms and conditions of employment may be subject to, and varied by, a collective agreement entered into between the company and a collective bargaining agent, which is intended to determine the terms of and conditions of employment.

**Annexure A**

**KEY TIMER BENEFITS:**
The application of any benefits will be in accordance with the Company's policies and procedures.

**ANNUAL LEAVE**
An Key Timer will be entitled to 18 working days leave for each period of 12 months continuous employment. Payment for such leave will be based on the average weekly earnings of the employee during the preceding twelve (12) month period. Annual leave will otherwise be in accordance with Section 120 of the Labour Code Order.

**SICK LEAVE**
The Key Timer will be entitled to the Sick leave in accordance with section 123 of the Labour Code Order provided that the Hour-timer has been scheduled to work during the day's sick leave requested.
Payment for such sick leave will be based on the average daily earnings of the employee during the preceding twelve (12) months period.

**SEVERANCE PAYMENTS**
Key Timers will be entitled to severance payment in accordance with Section 79 of the Labour Code Order No.24 of 1992. Payment for such severance benefits will be based on the average weekly earnings of the employee during the preceding twelve (12) month period.

**COMPASSIONATE LEAVE**
A Key Timer is entitled to 2 (two) paid days' time off provided that he/she has been scheduled to work during the day(s) compassionate leave is requested.

**MATERNITY LEAVE**
A Key Timer is entitled will be granted maternity leave in accordance with statutory requirements.

**LONG SERVICE AWARD**
A Key will receive 50% of the value that Permanent Full Time Employees receive for Long Service Awards.

**CHECK-OFF**
The Company will provide check-off facilities only in accordance with a valid recognition agreement.

**CALCULATION OF BENEFITS**
Where a benefit is to be determined with reference to a percentage or where not specified above, it will be based on remuneration for the guaranteed 100 hours or actual normal hours paid, whichever is the lesser**"**

**[3]** Upon their dismissal, Appellants referred two disputes to the DDPR. The unfair dismissal claim was settled amicably. Their unresolved claim was that their employer underpaid them by paying them wages less than the gazetted monthly statutory minimum wage applicable for their job category during the relevant period. The Arbitrator found in their favour and ordered Respondent to pay the shortfall.

**[4]** Thereupon Respondent lodged a review application with to the Labour Court, contending that the Arbitrator "erred and misdirected himself in interpreting he law pertaining to written contracts, collective bargaining agreements, as well as the Labour Code[1] and amendments thereto as applicable to minimum wages and ignored the dire consequences of his interpretation to the whole economy of Lesotho."

[1] i.e. the Labour Code Order No.24 of 1992 [as amended by the Labour Code (Amendment) Acts No's. 9 of 1997, 3 of 2000, 5 of 2006 and 1 of 2010]

**[5]** According to the judgement of the Labour Court, Respondents argued seven "incidents of errors of law" in support of the review, namely that:

> "a) Arbitrator erred in adopting the literal interpretation of the wages order that the wages orders applied to Respondents and that resulted in absurd results.
> b) In adopting the literal interpretation. Arbitrator ignored the purposive interpretation and thus committed an error of law.
> c) Having concluded that the wages order applied to respondents, arbitrator erred in concluding that the wages orders make no reference to the number of hours an employee has to work prior to earning monthly, weekly or daily wages.
> d) Arbitrator erred in concluding that respondents were entitled to the statutory minimum wages stipulated in the wages order on the ground that the parties had bargained for a higher standard.
> e) Having concluded that the minimum wages applied to respondents, arbitrator erred in concluding that respondents were entitled to full monthly wages prescribed in the wages orders, relying on the common law principle that employees are paid against tender of services and not actual performance.
> f) Having concluded that the wages orders applied to respondents, arbitrator erred in concluding that the hourly rates in the daily, weekly and monthly wages in the minimum wage orders are themselves different.
> g) Having concluded that the wages orders applied to respondents, arbitrator erred in finding that wages orders take precedence over a lesser contractual provision."

**[6]** The Labour Court found for the Respondent, relying solely on the "first incident of error of law". It ruled that since a literalist interpretation of the wage orders in issue (viz. that employees who work for 100 hours are entitled to the same wages as those work 195 hours) would result in an absurdity, "the learned Arbitrator used the wrong tool in determining the applicability and otherwise of the minimum wages to the [employees] and thus committed a grave mistake of law". It concluded that in view of this finding on the "first incident of error of law", it did not find it necessary to deal with the rest of the incidents, since they were all premised on a determination or conclusion that the wage orders applied to the aggrieved employees.

**THE APPEAL**

**[7]** The employees are appealing on the ground that the court a *quo* erred in holding that the Arbitrator used the wrong tool as stated above. They claim that the court disregarded the relevant provisions of the Code, the wages orders and ILO standards in arriving at this conclusion. It ignored the purpose of minimum wage fixing, and allowed the employer to undermine and exploit vulnerable workers in contravention of Convention 131. The court's conclusion also violates *section 61 (3) of the Labour Code*, which provides that: –

> "(3) No person shall employ any employee and no employee shall be employed under any contract except in accordance with the provisions of the Code. Any contract, whether entered into before or after the commencement of the Code, which contains any term or condition less favourable to the employee than any corresponding term or condition for which provision is made by the Code, shall be construed as though the corresponding term or condition of the Code were substituted for such less favourable term or condition or service in such contract. However, nothing in the Code shall operate so as to invalidate any term or condition of any such contract which is more favourable to the employee than the corresponding term or condition of the Code."

**[8]** The appeal is opposed by the employer. Its approach is that even though the court *a quo* chose to dispose of the review application on the basis of the first of the seven different misdirections by the Arbitrator leading to an error of law, on first principle, the company is entitled on appeal to defend the order of the court *a quo* on any grounds advanced by it before that court, and it not limited to the first misdirection. Appellant's counsel then proceeded to traverse all seven misdirections, in support of the order of the court *a quo*. I did not find anything untoward with this approach.

## THE ARBITRATOR'S AWARD

**[9]** I have decided to reproduce below *paragraph 20 of the Arbitrator's Award* (to which paragraph breaks and numbering (in brackets) have been inserted for ease of reference). It captures the essential basis of the Arbitrator's decision, and reads as follows:

> "[1] As mentioned the respondent argues that the applicants were not underpaid on the basis on the following: the Code does not outlaw hourly contracts, that the applicants' hourly rates of pay were higher than the hourly rates of pay as would be deducted from the minimum wage orders, that applicants signed contracts which provided they would work 100 hours per month whereas other employees worked 195 hours per month, and that it would never been the intention of the legislature to say that the two should earn the same salary and that it is unacceptable to say that any form of employment which makes you work for less than 45 hours a week is unlawful unless you are paid the 45 hours.
>
> [2] It is my opinion however that the said respondent's arguments cannot stand for the following reasons:
>
> a) Parties to an employment contract are at liberty to agree on higher standards than those set in the Code;
> b) Employees in an employment contract are in principle not paid for actual work performed but for tendering of service;
> c) The hourly rates in the daily, weekly and monthly wages in the minimum wage orders are themselves different;
> d) The Code [or the 2007, 2008 or 2009 wage order] makes no reference to the number of hours an employee has to work prior to earning the monthly, weekly or daily wages as stipulated in the minimum wage orders, it just stipulates amounts to be earned monthly, weekly or daily
>
> [3] It is against the foregoing background that <u>I come to the conclusion that there would be no absurdity in literally interpreting the minimum wage orders to say that one should be paid the stated amounts regardless of actual hours worked.</u>
>
> [4] It is appreciated that the agreements applicants had with the respondent state, as mentioned, that applicants shall be paid hours actually worked. This, as mentioned, has

> in some instances (stipulated above) led to applicants being paid monthly wages that are lower than those provided for in the minimum wage orders. Section 58 (1) of the Code provides however that: [quotation omitted]. I see no reason not to apply the abovementioned provision to the circumstances at hand. The agreement applicants had with the respondent has in some instances had the effect of depriving applicants [of] what they are entitled to in terms of the minimum wage orders in question. [2] (My emphasis.)

## THE STATUTORY SCHEME

### Minimum wage-fixing

**[10]** The minimum wage-fixing machinery for Lesotho is provided for in Part IV of our Labour Code. Section 51 (1) empowers the Minister to "prescribe the minimum wage to be paid and the conditions of employment to be applied to any employees" by causing a wages order to be published in the Government Gazette. And section 58 (1) enacts that "if a contract between an employee to whom a wage order applies and his or her employer provides for the payment of a wage lower than the statutory minimum wage… it shall have effect as if the statutory minimum wage was substituted for the lower wage".

**[11]** The principal legal instrument the Minister has promulgated pursuant to section 51 (1) is the Wage Order 1994[3] [as amended by the Wages (Amendment) Order 1995[4]]. The order states:

> "**Application**
>
> 2. (1) No person to whom this Order applies shall be employed at a basic wage less than which is applicable to him under Part I of this Order.
>
> (2) Any person whose occupation is not listed and defined under Part I and II of the Schedule to this Order shall not be employed at a basic minimum wage than that applicable to the occupation listed as Unskilled Labourer (Light Physical Work):

[2] Award: para 20 at Record pp 208-209
[3] Legal Notice No. 60 of 1994
[4] Legal Notice No. 109 of 1995

> Provided that if such a person is employed in an undertaking defined as a Small Business under Part II of this Order, such a person shall not be employed at a basic minimum wage less than that which is applicable in Small Businesses.
>
> **Calculation of employee's wages**
>
> 3. A normal hourly rate of wages for an employee other than a watchman shall be calculated as follows:
>
> (a) Where the employee is employed on a monthly contract, that employee's monthly wages shall be divided by 195 hours;
> (b) Where the employee is employed on a weekly contract, that employee's weekly wages shall be divided by 45 hour; and
> (c) Where the employee is employed on a daily contract, that employee's daily wages shall be divided by the employees' daily normal hours or work"

**[12]** Part I of the Schedule to the Order sets out basic minimum wages for the listed occupations under the headings (i) "Basic Monthly Contract"; (ii) "Minimum Weekly (per week)"; (iii) "Wage Daily (per day)". And Part II contains definitions of these listed occupations. The central/anchor provisions of this Order (viz. sections 2 and 3) have been retained unchanged since promulgation. Only the Schedule has been amended almost annually[5] in order to revise/update the basic minimum wages, and occasionally to amend the definitions of the occupational categories covered.

## Interpretation of the Labour Code

**[13]** Our Labour Code underscores the pivotal interpretative role ascribed to international labour standards. Section 4 enacts-

> **4. Principles used in interpretation and administration of Code**
>
> The following principles shall be used in the interpretation and administration of the Code:

[5] Per Legal Notice No's 131 of 1996, 106 of 1997, 102 of 1999, 169 of 2001, 172 of 2002, 146 of 2003, 153 of 2003, 177 of 2004, 132 of 2005, 165 of 2006, 169 0f 2007, 158 of 2008, 169 of 2009,

(a) The standards laid down in the Code are the minimum legally obligatory standards and are without prejudice to the right of workers individually and collectively through their trade unions to request, to bargain for and to contract for higher standards, which in turn then become the minimum standards legally applicable to those workers for the duration of the agreement;

(b) no provision of the Code or of rules and regulations made thereunder shall be interpreted or applied in such a way as to derogate from the provisions of any international labour Convention which has entered into the force for the Kingdom of Lesotho;

(c) in case of ambiguity, provisions of the Code and of any rules and regulations made thereunder shall be interpreted in such a way as more closely conforms with provisions of Conventions adopted by the Conference of the International Labour Organisation, and of Recommendations adopted by the Conference of the International Labour Organisation. [my emphasis]

## ANALYSIS OF ARGUMENT

### Misdirections leading the Arbitrator to an error of law[6]

### First misdirection

**[14]** The arbitrator's conclusion that there would be "no absurdity" in "interpreting the minimum wage order literally" to the effect that an employee should be paid the prescribed amounts "regardless of the actual hours worked" by him is, in my opinion, in itself absurd.

**[15]** On the arbitrator's reasoning an employee who worked for one hour a month and received his wages monthly would be due the full statutory monthly minimum wage. The interpretation offends the well-known principle of interpretation: if to give a provision in a statute its literal meaning would lead to an absurdity which the

[6] The seven misdirections are paraphrased in para 3 of the judgment at Record: pp 214-215
Award: pp 209-210, para 21.

legislature could not have contemplated, a court should adopt a construction, if possible, that would avoid the absurdity and give meaning to the intention of the legislature.[7]

**[16]** The construction that would avoid the absurdity is that the prescribed minimum wage rates are not simply applicable to employees who are paid on a monthly, weekly or daily basis, but rather to those that also work on full-time basis for the month, week or day – this being consistent with section 3 of the Wages Order 1994. The arbitrator misdirected himself by not having regard thereto.

**Second misdirection**

**[17]** Allied to the above, in arriving at the above-mentioned conclusion, the arbitrator went wrong in adopting a purely literal interpretation to the exclusion of a purposive interpretation.

**[18]** In terms of the purposive approach (also known as the text-in-context approach) the object and scope of the legislation (i.e. its contextual environment) is the prevailing factor in interpretation. The role of the courts is not limited to mere textual analysis and mechanical application of the legislative text.[8]

[7] Kellaway *Principles of Legal Interpretation* at 119, para 12.6.
[8] Christo Botha 97-9; the minority judgment of Schreiner JA in *Jaga v Dönges*; *University of Cape Town v Cape Bar Council*

**[19]** The purpose of a wage determination by the State is to protect employees against unduly low wages[9] for work performed by them. In the 2009 wage order, using the figures applicable herein, the State determined, that where an employee worked full-time for one day, he should earn at least M57; for one week at least M271 (roughly M57 x 5), and for one month at least M1188 (roughly M57 x 21 days).

**[20]** Although the wage order is silent as to what the figures denoted, that is what they meant – not that the employee was due M1188 simply because he happened to be paid at the end of each month. Put differently, the State's concern was not to ensure that just because an employee happened to be paid on a monthly basis, he should receive the full statutory minimum monthly wage, despite – as in this case – not having worked full-time for the month and only having worked half of the number of hours of a full-time monthly paid employee (100 instead of 195 hours).

**[21]** On what possible rational basis would the State ever have intended to: (i) benefit part-time employees over full-time employees (working twice as long as them) on this basis; and (ii) burden employers on this basis (by making them pay part-time employees twice what they have to pay full-time employees)?
Simple arithmetic demonstrates the point. In terms of the 2009 wage order, the State set the minimum wage for an employee who worked full-time for two weeks as

[9] See preamble to ILO Minimum Wage Fixing Convention, 1970 (no.131).

being M542 (271 x 2). The employee herein worked part-time for what cumulatively amounted to some two weeks in a month. On what possible basis would the State have intended that they should receive twice as much (M1188)?

**[22]** In short, the arbitrator's interpretation – which in its own terms involves a wholly literal interpretation – takes no account whatsoever of the purpose behind minimum wage orders. In circumstances where the wages orders offer little in explanation of the figures are capable of different interpretations, the arbitrator ought to have adopted a purposive interpretation.

**[23]** If he had, he would not have come to the conclusion that he did. Instead, he would have found either that the wage orders does not apply to part-time employees, or – and probably more correctly – that the amounts due thereunder must be determined on a *pro rata* basis in relation to part-time workers. This again being consistent with section 3 of the Wages Order 1994.

**Resort to international labour standards**

**[24]** It is not clear, from a reading of Part IV of the Labour Code and the Wage Order 1994 (as amended), whether the law giver intended minimum wage orders to apply to part-time employees such as the Appellants. And if it so intended, how their basic minimum wage should be calculated.

**[25]** In my view there is ambiguity in the legislation. And in this context, ambiguity means doubtfulness of meaning or intention[10]; uncertainly in meaning or equivocation[11]; a lack of clarity or uncertainty as to the law giver's intention[12].

**[26]** And in such cases the ambiguous provision shall, in terms of section 4 (c) of the Labour Code, be interpreted in such a way as more closely conforms with relevant Conventions and Recommendations adopted by the International Labour Organisation ("the ILO"). This includes Conventions not ratified by Lesotho.

**[27]** By this provision the Labour Code explicitly recognizes the authority of unratified Conventions and Recommendations in the interpretation of national legislation.[13] It unequivocally gives the courts a statutory mandate to use international law in interpretation.[14] The provision has been applied by the Labour Court in cases where the silence of the Labour Code on certain issues was viewed as an ambiguity which was resolved by reference to Conventions not yet ratified by Lesotho and related Recommendations.[15]

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[10] Oxford Dictionary of English (2010)
[11] Oxford Dictionary of Law (2015)
[12]The Longman's Dictionary of Law (2011); *Ex parte Slater, Walker Securities* (SA) Ltd 1974 (4) SA 657 (W) at 659
[13] See Thomas, Oelz & Beaudonnet 279.
[14] Halton Cheadle 358
[15] For example in *Palesa Peko v The National University of Lesotho* (unreported Case No.LC 33/94, [1995] LSLC I (1 August 1995) at www.lesotholii.org (accessed on 28 February 2018). See also *Macholo v Lesotho Bakery (Blue Ribbon) Pty Ltd* (LAC/A/4/04), [2006] LSLAC II (2 November 2006) at www.lesotholii.org (accessed 28 Feb. 18 2018)

**[28]** The rationale for this provision is that since the adoption of Conventions and Recommendations requires a very broad international tripartite consensus at the ILO conference, at both occupational and geographic level, this consensus gives these instruments great legitimacy and authority. They are thus regarded as expressing general principles of labour law and social protection that should be considered when a source of inspiration or interpretation is required in order to resolve labour disputes at domestic level.[16] Furthermore, section 4 (c) is in consonance with the Bangalore Principles (1998), which recommend, *inter alia*, that domestic courts may have regard to international conventions and norms for the purpose of removing ambiguity or uncertainty or incompleteness or insufficiency in domestic law.[17]

**[29]** I must hasten to add that in addition to Conventions and Recommendations, the comments, observations and opinions of ILO supervisory bodies such as the Committee of Experts on the Application of Conventions and Recommendations ("the CEACR") are increasingly being accepted as a significant aid in interpreting domestic law and a source of inspiration.[18]

**[30]** During argument, both parties sought to invoke the Minimum Wage Fixing Convention 1970 in support of their respective cases. However, this Convention does not advance their cases much. I instead found the Part-Time Work Convention,

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[16]Beaudonnet & Teklé 103-4;

[17] Discussed in Halton Cheadle 351-2; 362-3

[18] Beaudonnet & Teklé 31-2; Halton Cheadle 360

1994 (No. 175) more useful and relevant to the issue at hand. The aim of this Convention is to protect part-time workers.[19] Article 5 provides that "measures appropriate to national law and practice shall be taken to ensure that part-time workers do not, solely because they work part time, receive a basic wage which, calculated on an hourly, performance-related, or piece-rate basis, is lower than the basis wage of comparable full-time workers, calculated according to the same methods" [my emphasis].

**[31]** It is clear from the above that part-time workers will only be considered to suffer pay discrimination in comparison to comparable full-time workers if they receive a basic wage which is proportionately lower than of the full-time workers. The Part-Time Work Convention unequivocally endorses the *pro rata temporis*[20] principle to apply proportionate treatment between full-time and part-time workers as far as pay is considered. On this aspect this Convention is similar to the European Union's Part-Time Work Directive of 15 December 1997, whose main principle have been integrated into national laws across Europe.

**[32]** The *pro rata temporis* approach is also endorsed by the ILO Minimum Wage Policy Guide, which states that "for part-time workers, the amount of the minimum wage should be proportioned to their working hours".[21] It goes on to declare that

[19] Article 1 defines a part-time worker as "an employed person whose normal hours of work are less than those of comparable full-time workers"
[20] "At the rate of time. At a rate proportional to the time allotted" [*Guide to Latin in International Law. 2009 OUP]*
[21] At p13, para 1.8

"hourly minimum wages facilitate equal treatment between full and part-time employees"[22]

**[33]** In my view the *pro rata temporis* principle should be employed to answer the question whether the Appellants were entitled to be paid the full monthly statutory minimum wage for the part-time work they performed. The answer is that no, they were only entitled to be paid the basic minimum hourly rate for the hours actually worked, calculated in accordance with section 3 (a) of the Wage Order 1994.

**DISPOSITION**

**[34]** In the premises:

(i) this appeal is dismissed, with no order as to costs;

(2) Orders (1), (2) and (5) of the award of the court *a quo* are confirmed.

**……..**
**KEKETSO MOAHLOLI, AJ**
**JUDGE OF THE LABOUR AND APPEAL COURT**

**Appearances:**

K.K. Mohau KC for the Appellants
A. Mybugh SC for the Respondent

[22] Ibid