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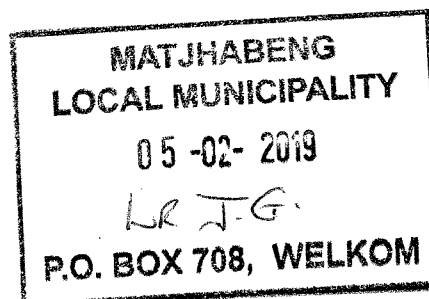
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MATJHABENG LOCAL MUNICIPALITY
WELKOM

Date: 28th January 2019

Dear Sirs

**RE: MATJHABENG LOCAL MUNICIPALITY: LEGAL OPINION: COLLECTIVE
AGREEMENT FOR FREE STATE DIVISION**

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OPINION

COLLECTIVE AGREEMENT FOR THE FREE STATE DIVISION OF THE SALGBC: CLAUSES 5.3.24, 9, 10 AND 17

1.

The Matjhabeng Local Municipality in capacity as employer represented by South African Local Government Association in its capacity as the employer's organisation and employees duly represented by Independent Municipal and Allied Trade Union ("IMATU") and South African Municipal Workers Union ("SAMWU") in their capacity as trade unions representing the employees are tied to a Collective Agreement¹ (Agreement) in the said opposing capacities².

2.

Matjhabeng³ received a letter from SALGBC⁴ informing that they were requested to conduct an investigation in its alleged breach of the Agreement⁵ and Matjhabeng had to

¹ Collective Agreement for the Free State Division of the SALGBC.

² Clause 1.1 of the Agreement stipulates with reference to the Scope thereof: *"The terms of this Collective Agreement shall be observed in the Local Government Undertaking in the Free State Province of the Republic of South Africa by all employees and by all employers who fall within the registered scope of the Free State's Division of the SALGBC"*.

³ Dated 10 January 2019 in the mentioned capacity as employer to the Agreement.

⁴ Defined in clause 5.3.2.1 of the Agreement as the "South African Local Government Bargaining Council".

⁵ On conditions of service for the Free State Division of the SALGBC.

answer to the allegations of breach contained in the attached letter of IMATU⁶ dated 13 December 2018 (IMATU, 13 December 2018)⁷

3.

The 13 salary slips attached to IMATHU, 13 December 2018, all rely on “standby” as form of relevant earnings for November 2018.

⁶ IMATU is described as the Independent Municipal and Allied Trade Union, a party to the Agreement: Definition, clause 5.3.23 and in a letter of 31 October 2016 from SALGBC.

⁷ The relevant contents of the letter states (own numbering for ease of reference): (i) “We record that IMATU is acting on behalf of the 13 listed members (see attached list). (ii) For the month of November 2018 all the mentioned IMATU members received a standby allowance in terms of Clause 10.1 of the Collective Agreement for the Free State Division of the SALGBC that read as follows: (iii) “10.1 An employee is entitled to a standby allowance when he/she is requested in a written instruction by the Municipal Manager or him/her to be available for the performance of duty outside his/her normal working hours’. (iv) We record that the abovementioned members were placed on standby and received a standby allowance. (v) What is however disturbing is that the Respondent Municipality is of the view that due to the fact that they are earning in excess of the threshold they will not be paid. (vi) Clause 17.4 of the Collective Agreement that regulates overtime reads as follows: (vii) 17.4 ‘Employees on standby in terms of clause 10 shall receive overtime payment when called out irrespective of the statutory threshold’. (viii) From the abovementioned it is clear that the employer is acting in contravention of Clause 17.4 of the Collective Agreement although it is crystal clear that they have an obligation to pay overtime. (ix) Section 6(2) of the Basic Conditions of Employment Act also support the Collective Agreement where it is evident that Section 10(1) does not apply to work which is required to be done without delay owing to circumstances for which the employer could not reasonably have been expected to make provision and which cannot be performed by employees during their ordinary hours of work. We record that all the applicants members worked emergency overtime and where they are entitled to overtime payment. (x) Further to the above Clause 21.10 is evident that: (xi) ‘21.10 Interest on any amount that a person is obliged to pay in terms of this Collective Agreement accrues from the date on which the amount was due and payable at the rate prescribed in terms of Section 1 of the Prescribed Rate of Interest Act, 1975 (act 55 of 1997) unless the Arbitration Award provides otherwise’. (xii) Therefore, it is our view that all overtime payments not paid must accrue interest at a rate of 10% per annum. (xiii) From the abovementioned and the attached salary advices it is clear that this prima facie demonstrate that the Matjhabeng Local Municipality’s conduct is in contravention of Clause 17.4 and 21.10 of the Agreement. (xiv) The conduct of Matjhabeng Local Municipality constitutes a material breach of the relevant provisions of the Free State Collective Agreement which is to the prejudice of IMATU and its individual members. (xv) IMATU requests a Compliance Order to be issued in terms of Clause 19.2 of the SALGBC Constitution”.

THE AGREEMENT:**NIGHT-WORK ALLOWANCE:**

4.1. Clause 9.1 makes provision for all employees to be paid a night-work allowance and in the event of an employee's salary being above the earnings threshold, the allowance to be capped on the earnings threshold as determined in the basic conditions of employment (BCEA)⁸.

4.2. Clause 9.2 stipulates that an employee qualifies for night-work when requested by the employee's superior as stipulated in Section 17(2)(a) of the BCEA⁹ and approved by the Municipal Manager or his assignee.

4.3. Clause 9.3 enacts the formula for compensation for night-work as $20/100 \times (\text{annual pensionable salary plus } 250 + 8) \times \text{actual number of hours working night-work}$.

STAND-BY DUTY ALLOWANCE:

⁸ Threshold amount was in 2014 fixed at R205 433,00. I am not aware of any increase in the amount since then.

⁹ The Basic Conditions of Employment Act, 75 of 1997 (BCEA) deals in Section 17 of the Act with night-work and of which the provisions are in consonance with the provisions of the Agreement (clause 9) as being employees that perform work after 18h00 and before 06h00 the next day to qualify for a night-work allowance.

- 5.1. Clause 10.1 stipulates that an employee is entitled to a stand-by allowance when requested in a written instruction by the Municipal Manager or his superior when the employee is to be available for the performance of duty outside his normal working hours.
- 5.2. Clause 10.2 stipulates the two requirements under which stand-by allowance is to be paid and clause 10.3 determines that a Municipality should have a delegation policy in place for purposes of the improvisation of the written instruction issued referred to in clause 10.1 (paragraph 5.1 *supra*).
- 5.3. Clause 10.4 enacts how a stand-by duty is to be calculated as being from the normal closing time of the employee's place of work or on a day on which the employee is not normally required to work and clause 10.5 stipulates that the stand-by allowance shall not affect or be affected by a remuneration for overtime or emergency work done by the employee during the period of stand-by.
- 5.4. Clause 10.6 provides the stand-by to be calculated as 10% of the normal hourly rate based on the pensionable salary formula and is the salary formula to be $10/100 \times (\text{annual pensionable salary}/250/8) \times \text{actual number of hours on stand-by}$.

OVERTIME:

- 6.1. Clause 17.1 enacts that an employee shall be entitled to be paid overtime when he is requested by written instruction by the Municipal Manager or his authorised assignee in accordance with the delegated authority to perform duty outside normal working hours.
- 6.2. According to clause 17.2 is overtime generally regulated in the BCEA (Section 10) and should the provisions of Section 10 govern overtime payment.
- 6.3. According to clause 17.3 shall overtime be paid to all employees except senior managerial employees as defined in the BCEA and employees earning in excess of the threshold as determined from time to time.
- 6.4. Clause 17.4 enacts that employees on stand-by in terms of clause 9 shall receive overtime payment when called out irrespective of the statutory threshold¹⁰.

¹⁰ As said (footnote 8) at present to be R205 433,00 and is this provision only applicable on employees on stand-by in terms of clause 9 (night-work allowance) and not on employees on stand-by duty allowance (clause 10). The letter referred to, footnote 7 IMATU, 13 December 2018, numbered paragraph (vii) refers to employees on stand-by in terms of clause 10 and which is not correct and contrary to the provisions of the Agreement. It must therefore be accepted that the provisions of clause 17.4 is only applicable on employees on stand-by in terms of clause 9 and not on stand-by in terms of clause 10 and therefore only be applicable on the employees as qualified in clause 9 and not

- 6.5. Clause 17.5 makes provision that the payment of overtime must be agreed to prior to the overtime being worked.¹¹
- 6.6. In accordance with clause 17.6 employees working or assisting in political and tourism offices during weekends or public holidays shall be entitled to overtime equivalent to 1 day's salary and as qualified in the mentioned clause.
- 6.7. In accordance with clause 17.7 will employees be entitled to a maximum of 15 hours overtime per week.
- 6.8. Section 10(2)¹² of BCEA provides that the employer must pay the employee at least 1½ times the employee's wage for overtime worked.¹³

in general as being clause 9 and 10 employees. The IMATHU letter, 13 December 2018, is therefore wrong in this regard.

¹¹ This provision only stipulates that the agreement to the payment of overtime to be done before the work is to be effected and is silent as to who are the role players in this agreement. I assume this will be done by the Municipal Manager or his assignee as referred in clause 17.1 (paragraph 6.1 *supra*). If that is so, then the written instruction by the authorised to the employee should be regarded as the agreement for payment of overtime. Section 10(1)(a) of BCEA provides that an employer may not require and/or permit an employee to work overtime except in accordance with an agreement.

¹² Section 10 of BCEA deals with overtime and as said, clause 17.2 (paragraph 6.2 *supra*), is overtime generally regulated in BCEA Section 10.

¹³ Overtime payments are therefore considerably higher than night-work (clause 9) and stand-by (clause 10) and shall stand-by not be affected by overtime, clause 10.5, paragraph 5.3 *supra*.

6.9. Section 10 of BCEA is further qualified that all employees earning in the excess of the threshold amount are to be excluded from *inter alia*, Sections 10 and 17 of BCEA.¹⁴

7.

STAND-BY SERVICE:

Clause 5.3.24 defines “*stand-by service*” as a period determined by the Municipality during which an employee shall be available for emergency and overtime work outside his normal working hours.

8.

CONCLUSION:

8.1. All employees qualify for **night-work** and when an employee’s salary exceeds the earnings threshold¹⁵ the allowance is to be capped on the earnings threshold as determined in the BCEA Section 17.

¹⁴ As said (footnote 10) at present R205 433,00 and therefore excluded from the substantially higher amount of compensation referred to in Section 10(2) (paragraph 6.8 *supra*).

¹⁵ Paragraph 4.1 *supra*.

- 8.2. Employees qualify for night-work when requested by the superior and approved by the Municipal Manager or his assignee¹⁶.
- 8.3. The formula for compensation for night-work is $20/100$ (annual pensionable salary plus R250 plus 8) x actual number of hours work¹⁷.
- 8.4. An employee qualifies for **stand-by duty allowance** when requested in a written instruction by the Municipal Manager or by the employee's superior when the employee is available for performing outside his/her normal working hours¹⁸.
- 8.5. The **stand-by allowance** should not affect or be affected by any remuneration for overtime or emergency¹⁹.
- 8.6. The **standby remuneration** is 10% of the normal hourly rate and is the salary formula $10/100 \times (\text{annual pensionable salary}/R250/8) \times \text{actual number of hours on stand-by}$ ²⁰.

¹⁶ Paragraph 4.2 *supra*.

¹⁷ Paragraph 4.3 *supra*.

¹⁸ Paragraph 5.1 *supra*.

¹⁹ Paragraph 5.3 *supra*.

²⁰ Paragraph 5.4 *supra*.

- 8.7. An employee qualifies for **overtime** when requested by written instruction by the Municipal Manager or his authorised assignee as delegated to perform duty outside normal working hours²¹.
- 8.8. Overtime shall be paid to all employees except senior managerial employees as defined in BCEA and employees earning in excess of the determined threshold.²².
- 8.9. Employees on stand-by on clause 9 (night-work) shall receive overtime when called out irrespective of statutory threshold²³.
- 8.10. Payment of overtime must be agreed to prior to overtime being worked²⁴.
- 8.11. The employer must pay the employee at the least 1½ the employee's wage for overtime.²⁵

²¹ Paragraph 6.1 *supra*.

²² Paragraph 6.3 *supra*.

²³ Paragraph 6.4 *supra*. Senior managerial employee means an employee who has the authority to hire, discipline and dismiss employees and to represent the employer internally and externally. (BCEA Section 1, Definitions)

²⁴ Paragraph 6.5 *supra*.

²⁵ Paragraph 6.8 *supra*.

8.12. Employees earning in the excess of the threshold amount are to be excluded from the 1½ times salary wage for overtime.²⁶

8.13. IMATU, 13 December 2018, states that the 13 employees received a stand-by allowance in terms of clause 10.1 when requested by means of written instruction by the Municipal Manager or his superior.²⁷

8.14. An instruction in terms of clause 10.1 (relied on by the employees) is in writing²⁸ and would have indicated whether it is for stand-by or overtime²⁹.

8.15. Employees on **stand-by** shall receive overtime payment when called out irrespective of the Statutory threshold.³⁰

²⁶ Paragraph 6.9 *supra*.

²⁷ Letter IMATU, 13 December 2018, footnote 7 numbered paragraphs 2, 3 and 4.

²⁸ Paragraph 8.4 *supra*.

²⁹ Paragraph 8.7 *supra*.

³⁰ Paragraph 6.3, *supra*. In IMATU, 13 December 2018, the employees rely on the same provision.

Yours Faithfully



N.V. FINGER

FINGER ATTORNEYS.

IN FINAL CONCLUSION:

- 9.1. Employees on stand-by have no automatic right to overtime.
- 9.2. Employees on stand-by receive overtime when called out irrespective of the Statutory threshold.
- 9.3. The 13 employees admit that they qualified for stand-by in terms of clause 10.1 and which could only have taken place on written instruction. The written instruction by the Municipal Manager or his assignee would have indicated whether the request is for stand-by (clause 10.1) or for overtime (clause 17.1). No such instructions in support of the letter IMATU, 13 December 2018, are attached.
- 9.4. If the 13 employees were requested by written instruction for overtime by the Municipal Manager or his authorised assignee whilst they were already on stand-by the written requests/instructions would have been available as part of the 13 employees' motivation for their overtime in IMATU, 13 December 2018. Nothing to this effect is attached.

- 9.5. The 13 respondents give no detail or facts about the hours when and how long and where during November 2018 they allegedly worked overtime for Employer to answer thereto, example for Employer to verify and trace whether such requests were issued by the Municipal Manager or his authorised assignee.
- 9.6. The employees attach no prior agreements for overtime as one would expect.
- 9.7. Matjhabeng is therefore not in breach of the current Collective Agreement on conditions of service for the Free State Division of the SALGBC.
- 9.8. I consequently, see no reason why, on the papers in front of us, any further payments, over and above the stand-by payments made for November 2018, should be made by Matjhabeng.

10.

- 10.1. I recommend accordingly.