



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO JS 633/07

In the matter between:

WILLIAM JOHN LUDICK

PLAINTIFF

and

RURAL MAINTENANCE (PTY) LTD

DEFENDANT

Heard: 28 October 2013

Judgment delivered: 30 October 2013

JUDGMENT

VAN NIEKERK J

Introduction

- [1] The plaintiff was employed by the defendant from 5 January 2004 until 1 April 2006. The plaintiff claims the value of accrued leave pay in the amount of R 65 151.17, a sum that represents the value of leave accrued over two leave cycles. The defendant contends that in terms of the plaintiff's employment contract, he forfeited that leave. When the matter was called on the trial roll, the parties

agreed that before leading any evidence, the court should at the outset determine a point of law.

[2] Simply stated, the points to be determined are these:

- a. Did the plaintiff forfeit the annual leave accrued by him during the annual leave cycle that commenced on 5 January 2004?
- b. Did the plaintiff forfeit the annual leave accrued by him during the leave cycle that commenced on 5 January 2005?

Material facts

[3] The plaintiff commenced work for the defendant on 5 January 2004. For the purposes of s 20 of the Basic Conditions of Employment Act, 75 of 1995 (the BCEA) and the accrual of annual leave, 5 January is the start of each 12 month leave cycle during which the plaintiff accrued leave. For the sake of convenience, I shall refer to the leave cycle that commenced on 5 January 2004 as 'leave cycle 1' and that which commenced on 5 January 2005 as 'leave cycle 2'.

[4] The plaintiff's contract of employment provides for 15 working days leave for each completed 12 months' of service. This equates to the statutory minimum period of leave to which every employee is entitled (see s 20(2) of the BCEA). Clause 7.10 of the plaintiff's employment contract provides:

"Paid leave entitlement shall be fifteen (15) work days for each completed twelve (12) months of service, to be taken at the convenience of the Company. Leave not taken within thirty (30) days of financial year end shall lapse. Unpaid leave must be applied for and approved in advance by the Chief Executive of the Company."

[5] It is common cause that the defendant's year-end is 28 February. Clause 10.7 of the contract therefore required the plaintiff to take the leave accrued by him in the previous leave cycle by no later than 30 March of each year, i.e. a period of some three months after the completion of the leave cycle. For reasons that are not relevant to the determination of the point of law raised by the parties, the

plaintiff took no leave during the two leave cycles that are in issue. He was paid on a pro-rated basis for leave accrued between 5 January 2006 and the date of termination, 1 April 2006.

The relevant legislation

[6] Section 20 of the BCEA reads as follows:

“Annual leave. - (1) In this Chapter, “annual leave cycle” means the period of 12 months’ employment with the same employer immediately following-

- (a) an employee’s commencement of employment; or
- (b) the completion of that employee’s prior leave cycle.

(2) An employer must grant an employee at least—

- (a) 21 consecutive days’ annual leave on full remuneration in respect of each annual leave cycle; or
- (b) by agreement, one day of annual leave on full remuneration for every 17 days on which the employee worked or was entitled to be paid;
- (c) by agreement, one hour of annual leave on full remuneration for every 17 hours on which the employee worked or was entitled to be paid;

(3) An employee is entitled to take leave accumulated in an annual leave cycle in terms of subsection (2) on consecutive days.

(4) An employer must grant annual leave not later than six months after the end of the annual leave cycle.

....

(10) Annual leave must be taken—

- (a) in accordance with an agreement between the employer and employee; or
- (b) if there is no agreement in terms of paragraph (a), at a time determined by the employer in accordance with this section.

[7] Section 40 of the BCEA regulates payments on termination of employment. Paragraphs (b) and (c) are relevant for present purposes. They read as follows:

‘40. On termination of employment, an employer must pay an employee-

- (a) ...

- (b) remuneration calculated in accordance with section 21 (1) for any period of annual leave due in terms of section 20(2) that the employee has not taken; and
- (c) if the employee has been in employment longer than four months in respect of the employee's annual leave entitlement during an incomplete annual leave cycle as defined in section 20(1) -
 - (i) one day's remuneration in respect of every 17 days on which the employee worked or was entitled to be paid; or
 - (ii) remuneration calculated on any basis that is at least as favorable to the employee as that calculated in terms of subparagraph (i).'

- [8] The effect of these provisions, broadly speaking, is that on termination of employment, an employer is obliged to pay to an employee his or her full remuneration in respect of annual leave accrued but not granted before the date of termination, together with a pro rata amount in respect of the then current leave cycle. Theoretically, as case such as the present should not arise, since the Act assumes that employers grant employees their annual leave in accordance with s 20. Be that as it may, that is not what occurred in the present instance.
- [9] Mr. Wilke, who appeared for the plaintiff, contended that since the BCEA does not provide for the forfeiture of annual leave accrued but not taken, an employee is entitled to accrue leave on an unlimited basis, without the prospect of that leave ever being forfeited or any other constraint on the recovery of its value on termination of employment. In particular, s 40 (b) of the BCEA entitles an employee to be paid for 'any period of annual leave due in terms of s 20 (2) that the employee has not taken.' On this basis, he contended that clause 10.7 of the employment contract was invalid, since it established a condition of employment less favourable than that required by the Act. In the alternative, Mr Wilke submitted that an employee is entitled to accrue leave for at least the six-month period referred to in s 20 without that leave being forfeited. On this basis, he submitted that the plaintiff has a claim at least in respect of leave cycle 2, since

the six-month period following the completion of that leave cycle had not lapsed when the plaintiff's employment terminated.

[10] Mr. Mosam, who appeared for the defendant, submitted that the plaintiff had no claim to the value of accrued leave in respect of both leave cycles. In both instances, he contended, there was no leave due to the plaintiff since that leave had lapsed in terms of clause 10.7 of the contract. Specifically, the BCEA made no provision for the unlimited accrual of annual leave and that in any event, s 20 (10) specifically contemplated agreement on the time at which leave should be taken. Clause 10.7, he submitted, constituted such an agreement.

[11] In *Jardine v Tongaat-Hulett Sugar Ltd* [2003] 7 BLLR 717 (LC), this court held that s 20(4) of the BCEA, by requiring an employer to grant annual leave within six months after the end of a leave cycle, sought to protect employees who might otherwise be denied leave. At paragraph [14] of the judgment, the court (per Pillay J) stated:

'It imposes an obligation on the employer, enforceable at the instance of the employee. It does not impose an obligation on the employee to take leave within six months after the end of the annual leave cycle. Leave not taken within six months is not automatically forfeited.'

[12] On this basis, Pillay J held that s 20 (4) imposes an obligation on the employer, enforceable at the instance of the employee, to take leave within six months after the completion of an annual leave cycle. Leave not taken within the six months after the end of a leave cycle is not automatically forfeited, nor is any right to payment in respect of that leave forfeited (at paragraph [14] of the judgment. However, the court went on to say at paragraph [16]:

'Nothing in section 20, however, prevents an employer from requiring an employee to take annual leave in terms of section 20 (4)'

[13] A different view was expressed in *Jooste v Kohler Packaging Ltd* (2004) 25 ILJ 121 (LC), where Franklin AJ held that the pro-rated payment in respect of a

current leave cycle aside, s 40 of the BCEA contemplates payment only in respect of leave immediately preceding that during which the termination takes place. He did so on the basis that an employer may not refuse an employee leave, and that the Act contemplates that leave will be taken. To permit payment in respect of prior leave cycles would be to permit both the employer and employee to circumvent the Act (see paragraph 3.4 of the judgment). This view reflects that of Wallis *Labour and Employment Law* who says the following:

'S12 (4) (a). It is submitted that the reference to 'leave accrued' in this section is a reference only to leave which has accrued and which would but for the termination of the contract have been taken during a period of 6 months (s 12(2)(a)) from the end of the previous leave cycle. It would be incongruous to interpret s 12 (4) (a) as applying to leave which was not taken as required by the Act and to which the prohibition contained in s 12 (9) of the Act applied. In effect it would enable both employer and employee to circumvent the provisions of the Act."¹

[14] In response to a submission by counsel to the effect that an employer should not be enriched by a transgression of the Act by receiving a benefit of the work done by the employee, Franklin AJ stated that the simple answer was for the employee to insist on the rights that the section conferred, and that an employer who does not grant the rights can be dealt with under the enforcement provisions of the Act.

Analysis

[15] I deal first with leave cycle 1. Here, I see no good reason why the court should not follow the decision in *Jooste*, where this court limited claims for the value of accrued leave to annual leave accrued but not taken in the current and the immediately prior leave cycle. Mr Wilkie's argument in support of an unlimited right to claim the value of accrued leave is premised on the proposition that because the Act does not permit the forfeiture of annual leave, leave accrued

¹ At paragraph 17 footnote 16. The references to s 12 of the 1983 BCEA do not affect the substance of the submission – s 20 of the 1997 BCEA similar to s 12 of the old Act.

cannot be forfeited. But that is not the structure of the Act. The Act establishes a clear floor of rights (or basic conditions of employment) which are positively expressed and which are incorporated by law into every contract of employment. As Franklin AJ observed, one of the very purposes of the BCEA is that employees take annual leave, and to permit payment on termination of employment from prior cycles would undermine the purpose of s 20. If the plaintiff is aggrieved at the defendant's conduct in frustrating that purpose, he is entitled to invoke the enforcement provisions of the Act.

- [16] In so far as the plaintiff's claim in respect of cycle 1 relies on the wording of s 40 (b), the word 'any' in that section is qualified by the phrase '..... period of any annual leave due in terms of s 20(2)...'. Section 20(2) stipulates only the number of consecutive days' annual leave that an employer must grant in respect of each annual leave cycle. It does not regulate the timing of that leave, even less does it contemplate that an employee might accrue leave but never take it, only to cash in its value on termination of employment.
- [17] In relation to leave cycle 2, the accrued leave that forms the basis of the plaintiff's claim could ordinarily have been taken six months from 6 January i.e. by 6 July, but for clause 10.7 of the contract. The issue here is whether a contractual provision that any leave accrued but not taken by 28 February of each year "shall lapse" is less favourable than a basic condition of employment stipulated by the BCEA, or, put another way, whether an employer may stipulate, as a term of an employment contract, that an employee forfeit any annual leave not taken by a date that falls short of the six-month period contemplated by the Act.
- [18] The Act imposes an obligation on an employer to grant leave before the expiry of the six-month period. There is no right on the part of the employee to take leave at any time in that period. Section 20 (10) is a clear indication that the BCEA envisages that the timing of leave, once accrued, ought ideally to be the subject of agreement between the parties. In the absence of agreement, the employer may determine the time at which leave should be taken (s 20 (10) (b)). There cannot, therefore, be any objection in principle to a provision in an employment

contract that entitles the employer, ultimately, to dictate the timing of annual leave. But the timing of leave is one thing; the forfeiture of leave is quite another. The Act does not contemplate that an employee who does not take leave accrued in an immediately preceding leave cycle at an agreed or determined time during the six-month period following that cycle is necessarily denied that leave, or on termination of employment, its value.

- [19] In short: Section 20 of the BCEA contemplates that claims for the value of accrued leave are limited to statutory annual leave accrued in the current and immediately preceding leave cycles. An employee does not forfeit that leave or any claim to its value if for whatever reason, the leave is not taken in the six month period contemplated by s 20 (4).
- [20] A provision in a contract (such as clause 7.10 when applied in the present instance) would seem to me therefore to deny the plaintiff the benefit of a statutory basic condition of employment, which in terms of s 4 of the Act, must be read down into his employment contract.
- [21] Finally, in relation to costs, s 162 of the LRA confers a broad discretion on the court to make orders for costs according to the requirements of the law and fairness. The applicant has been partially successful. In so far as the defendant relies on a 'with prejudice' offer to pay the value of leave accrued in leave cycle 2 to claim costs, that offer did not incorporate interest, and was made in the context of a late abandonment of a counter-claim. In these circumstances, it seems fair to be that each party should pay its own costs.

For these reason, I determine the point of law as follows:

1. The applicant is entitled to the value of annual leave accrued by him during the leave cycle ending on 5 January 2006 but not taken, together with interest thereon at the prescribed rate.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the plaintiff: Adv. F Wilke, instructed by Beukes and Sonja Nel Attorneys

For the defendant: Adv. A Mosam, with him Adv. Y Salojee, instructed by Adams and Adams.