IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Labour Appeal Court Case no CA17/2016

WORLD LUXURY HOTEL AWARDS (PTY) LTD **Appellant**

and

DE WET, MARINIQUE **Respondent**

Heard: **31 October 2017**

Delivered: **15 December 2017**

Summary: Pleadings – interpretation of – scope of cause of action and scope of defence – to be examined in context of the whole – claim for outstanding leave pay - Labour Court ruling that the defence pleaded was limited – effect of ruling was to deny the true scope of defence to be ventilated - ruling set aside and matter remitted for trial on this issue to be resumed

'severance package' – interpretation of this phrase in this matter – not appropriate to attribute a universal or familiar meaning to a stock phrase – the usage of the phrase to be examined in context of whole agreement – laypersons drafting the agreement – purposive approach to use of chosen terminology appropriate

Held - that in this agreement the phrase was to be given a meaning peculiar to the agreement – parties agreeing on certain termination benefits if the business not

sold to the employee when she terminated the employment for any reason other than dishonesty – these included a so-called 'severance package' – in context simply a termination benefit – the phrase did not in this particular agreement imply a sum of compensation paid by the employer for a termination for operational reasons – employee entitled to the severance package as defined – appeal upheld

Coram: Coppin, Sutherland JJA and Savage AJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] The respondent, De Wet, had been employed by the appellant. She resigned. Later she sued the appellant on her employment contract, making a claim for a payment in respect of outstanding leave allegedly not taken, and making a claim for a payment of a sum allegedly owing upon the termination of the contract. She succeeded before the Labour Court on both claims, whereupon, her employer, the appellant, prosecuted an appeal against judgment in both claims.

[2] The first issue on appeal concerns the claim about outstanding leave pay, and turns on whether a ruling given during the proceedings, by the Labour Court, resulted in an unfair trial. The effect of the ruling was to deny the appellant the opportunity to ventilate a case it wished to advance; the Labour Court took the view that the pleadings did not include that case. The gravamen of that controversy is the proper interpretation of the pleadings, read with the minutes of the pre-trial conference.

[3] The second issue on appeal concerns the payment of what is called a "severance package" and turns on the proper interpretation of the employment

contract. More specifically, the issue is whether De Wet was entitled to a "severance package" if she resigned or if such "severance package" became owing only if the appellant dismissed her.

[4] The two issues are addressed discreetly. Neither claim is one regulated by the Labour Relations Act 61 of 1995 (LRA). The case came before the Labour court pursuant to section 77(3) of the Basic Conditions of Employment Act. (BCEA) conferring concurrent civil jurisdiction on the Labour Court.

The Leave Pay Claim

[5] The employment contract entitled De Wet to 24 days' annual leave. (clause 6.1) She was forbidden to take such leave during her notice period, unless she got written permission. (clause 6.3) Upon termination of the contract, she was entitled to "receive payment for the leave due to her" (clause 6.4). She was obliged to give two calendar months' notice (clause 5, 5.1.). The notice period could not run concurrently with any leave taken (clause 5.2).

[6] She resigned on 1 January 2015, and gave two calendar months' notice.

[7] She and Lourens, on behalf of the appellant, reached an agreement on 7 January about her using her leave during the notice period. She confirmed her understanding of the agreement in an e-mail on 8 January. The terms of the agreement are disputed. More important than that dispute, however, is *what issues were formulated on the pleadings* in respect of the leave pay claim, which led, ultimately, to a controversy, resolved by the controversial ruling.

[8] In De Wet's statement of claim, she averred that 102.5 days of leave were outstanding as at 28 February 2015, being the date upon which her notice period expired. She set out in paragraph 14, a table of how it was computed, reflecting how many leave days per year since 1 September 2009, she alleged she had not taken and would pursuant thereto, be entitled to payment in lieu of such leave as contemplated by clause 6.4 of the employment contract. She claimed payment for all 102.5 days.

[9] The statement of defence averred thus:

> '[De Wet] resigned...she did not wish to work out her notice period and instead tendered to take leave during her notice period, which tender was accepted ...' (Paragraph 11 of the statement of defence).

[10] The statement of defence went on to belabour that point. The appellant averred that at De Wet's request, she was permitted to "use the leave which was due to her (according to her)" instead of "working out" her notice period (Paragraph 19 of the statement of defence). The appellant further averred, in paragraph 22, and again in paragraph 26, that, in these circumstances, De Wet was not "entitled to any payment for leave *not used by her* during her employment.". In paragraphs 24 and 25, it was averred that:

> '...[appellant] was required to grant [De Wet], at her written request, the leave she wanted to take, during the period of notice which she gave.... [De Wet's] leave was accordingly taken in accordance with the agreement .... and there was no contravention of the BCEA'.

[11] The averments, as cited, were entwined with other averments which are surplusage to this controversy. The minute of the pre-trial conference reiterated that the "fact in dispute" which the Labour Court was asked to decide, was whether she was entitled to pay for 102.5 days of leave:

> '...notwithstanding the fact that she requested not to work out the notice period and elected/requested to go on leave instead'.

[12] What do these several averments mean to say? A reading of the text of these pleadings indicates, in my view, that the appellant disputed *any liability* to pay for *any leave* due because of the agreement to allow her to take leave in lieu of serving out two months' notice. However, notably, the table in the statement of claim setting out the number of days of leave allegedly not taken was not expressly addressed in the statement of defence. The impression left on the reader is that the appellant's case was that the claim *per se*, for leave pay, was

extinguished by the agreement, and the number of days alleged "due" was immaterial *per se* to that defence.

[13] When the trial began De Wet made a concession. Her statement of claim had been silent about taking leave in lieu of serving out her notice period; that fact was first mentioned in the statement of defence. She acknowledged that she had done so, and abandoned 41 days of her 102.5 days claimed, being the leave taken over the two-month notice period. What effect did this concession and abandonment have on the pleaded case?

[14] Counsel for De Wet then said to the Court, that his grasp of the pleadings was that the defence of the appellant was as follows (Record 37):

> '...at no stage was [de Wet's) allegations denied other than the two-month period. [De wet] has always pleaded it was more than – she had more than two months leave due and the only dispute was – and the response was to that it's a two-month period. It doesn't deal – and we set out specifically how leave was calculated. And I do understand ...that my learned friend intends to bring a new defence to this claim which was not pleaded.... I would have a serious objection to that being raised at this late stage.'

[15] In response, counsel for appellant says that (Record 37):

> 'I don't have an instruction on the exact numbers for leave paid as I stand... obviously we've prepared on the basis as pleaded in the statement of case that [De Wet] was simply not entitled to take leave during her notice period... obviously that's no longer in dispute...as far the rest is concerned, we were discussing that outside, ... I hav'nt got a final instruction...'

[16] What does all of this mean? Is it contemplated to amend to introduce a new defence? If so what is the new defence? Is counsel for appellant in the dark about the 102.5 days computation? The Labour Court is not told what the allusions relate to. Why, if at all, did the appellant's pleaded defence become inadequate because the quantum of the claim was reduced? What effect, if any, would the elimination of a legal argument about the lawfulness of taking leave

during the notice period, alluded to initially by the appellant not De Wet, have on the appellant's pleaded case? The position was, and remained, obscure and the trial trundled on to hear De wet testify.

[17] Then, after De Wet had testified, and was being cross-examined, it was put to her that (Record 123):

> 'The company is going to give evidence that you took leave at your discretion with a relaxation of leave forms. So, your claim that you had no leave isn't true... you had leave, but didn't submit leave forms...'

To this challenge, the record reflects that the answer was inaudible. Regrettably, no reconstruction was ostensibly attempted.

[18] Then Counsel for De Wet interrupted the cross-examination to submit that the computation of her leave claim had never been put in dispute (Record 124):

> "I pointed out...right from the outset that the whole issue of what she was entitled to was clearly set out in the statement of case and it was never disputed. No other version was given...why she was not entitled to this leave, but I accept for the two-month issue, which we have now conceded, once that is conceded there is no denial that the employee was entitled to that leave.... (Record 125)... but...now in cross-examination...for the first time to start finding reasons why the leave, she's not entitled to....[it] is not proper at this stage. It should have been pleaded".

[19] Counsel for appellant then remarks that (Record 125):

> '...the way its pleaded, yes, to some degree. .I would argue that my learned friend is correct, but its couched in a claim for leave pay that is due because it was taken in notice period'.

[20] The concession that she cannot be paid for the leave taken during the notice period is then noted. Further on counsel for appellant says (Record 125):

'now she's led evidence ...that she's entitled to so much other, leave to run – now rode on the back of that claim. It's kind of an additional sort of, oh, by the way, leaves other leave which wasn't pleaded, but the've persisted with that claim alone....'

[21] The exchanges carry on but with no illumination. What seems fair to extract from all the information?

[22] The concession that the leave granted and paid for that overlapped with the notice period was not unlawful did not eliminate the whole claim of De Wet. Nor could that abandonment curtail the appellant's case that an agreement had extinguished any claim to the leave pay. The confusions evidenced are most regrettable.

[23] When the ruling was given by the Labour Court that a claim for 102 days had been made and the concession merely eliminated 41 days, leaving the balance of an *uncontested* number of days, that perspective was wholly justified, but really unimportant. If the appellant had wanted to have the Labour Court decide if 102.5 days was truly what was outstanding as leave due, an amendment would have been necessary. That was not the point of the pleaded case; nor is it apparent that the appellant's representative had fully grasped what the real point ought to have been to legitimise the cross-examination upon which he had embarked. Indeed, the appellant's pleaded defence, if it to be understood fairly, was premised on the notion that some sort of waiver of leave not taken was subsumed into the agreement to "use" leave to avoid sitting out the two months of notice, not a challenge to her computation of days allegedly not taken as leave.

[24] Cross-examination on her allegations about the days, supposedly not taken, was relevant to that issue, not only to an unpleaded issue about computation of the days. The controversy over the disputed terms of the agreement allegedly extinguishing any claim for untaken leave implicated her credibility. Quite properly, the discrepancy between her pleaded claim and an earlier claim for 42

days was fertile ground for proper interrogation. Her claim of having built up such a huge outstanding leave entitlement was a proper topic for the appellant to challenge in relation this issue, and if a case could have been advanced that she was untruthful about an allegedly inflated claim, and her true leave entitlement was an approximation of the two months that would have been relevant to the probabilities about the alleged extinction of any further claims to leave pay.

[25] In summary, therefore, the ruling was incorrect because the perspective adopted by the Labour Court, in part engendered by the incoherence of the submissions advanced, was inappropriately focussed on what was not pleaded but overlooked what was indeed pleaded and the propriety of cross-examination in relation to that pleaded issue. The ruling resulted in an unfair trial.

[26] Accordingly, the appeal on this issue must succeed, and the ruling is set aside. The appropriate relief is to remit this claim to resume the trial.

The severance pay dispute

[27] The locus of the controversy is clause 12 of the employment contract.

> 'SEVERANCE
>
> 12.1 In the event that the employee's employment is terminated for any reason other than dishonesty, the employee shall be entitled to the payment of the severance package on the terms as set out below.
>
> 12.2 Where the firm is sold to a party other than the employee, the employee shall be entitled to a payment of a lump sum (axb) calculated at 15% of her last month's salary within the firm's employ (a) multiplied by the period 1 September 2006 to the date of severance(b).
>
> 12.3 Where the employees employ within the firm is terminated, the employee shall be entitled to a payment of a lump sum (axb) calculated at 7.55 of her last month's salary within the firm's employ (a) multiplied by the period 1 September 2006 to the date of severance(b).'

[28] The contending submissions all tend to rely heavily on a textual analysis. But prior to trying to divine meaning from the text, it is appropriate to register the relevant facts that give this contract its context. This exercise embraces the recognition that it is an *employment* contract, drawn up for the "executive manager". It is a bespoke contract. It is the second contract drawn up between the parties, and one devised for and by the two *de facto* principals, not their agents, and both were well acquainted with one another. When this contract was signed, De wet had already been instrumental in building up the business since 2006, seven years in all, and was a key actor is its activities, being *de facto* in charge of the operations. She was, however, not a director. Clause 11 conferred on De Wet a right of first refusal should the business be up for sale; a significant indication of her role, status and commercial interest in the business, which when read with other provisions must be taken together to grasp the substance of the relationship between De Wet and the appellant.

[29] The meaning of the use of the words "severance package" is hotly contested. The two poles are that, at the one end of the spectrum, it is a familiar labour relations term that can and ought to be always understood to embrace termination of an employment contract at the instance of an employer and in respect of which compensation for the loss of the job is paid to the employee, and at the other end of the spectrum, it is a mere label, devoid of any objective, independent or historical content or meaning, other than that conferred *ad hoc* by the terms of the written instrument in which it is used.

[30] In my view, it will be seldom that a single word (or pair of words) however critical to the expression of an idea or of an obligation or of a right, is capable of being understood appropriately on its own. More usually, it is the *phrases*, if not the *sentences*, in text, that require close examination to divine meaning. As Humpty Dumpty has argued and Alice has cautioned, a word might mean whatever we

want it to mean, depending on what we want to achieve with it.[1] In this case, as always, the words are defined by the work that they are marshalled to perform.

[31] An analysis that begins by plumbing the depths of the traditional usage of the phrase "severance package" instead of beginning with the whole text, in context, in order to divine what work the phrase is required to do, is an approach from the wrong way around.

[32] A close examination of clause 12.1 yields that a payment fell due on the "termination" of the employment "*within the firm*". "Firm" is defined, on page 1 of the contract to identify the appellant.[2] That payment was called a "severance package". What does clause 12 say about the causa for the payment, other than the termination of the employment?

32.1. Payment upon termination for dishonesty was excluded. Thus, crookedness, so excluded, implies that the payment remained due for other kinds of typical employee misconduct; eg late-coming, insubordination, dereliction of duties and so forth.

32.2. Accordingly, if dishonesty alone was a *causa* that excluded De Wet from an entitlement to a "severance package" can it be said that the "severance package" so labelled *in this clause* is the same species of "severance package" which is associated with a typical retrenchment? In my view, the answer is no.

32.3. The parties, in articulating their agreement, must have used the label in another sense, peculiar to their aims; aims which are expressed in clause 12.2 and 12.3.

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[1] "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all." Lewis Carroll , *Through the Looking-Glass,* chapter 6, p. 205 (1934 edition).

[2] The business had recently been incorporated when this employment contract was drawn up and, ostensibly, some nostalgia must have lingered for the 'firm' in this choice of term.

32.4. Clause 12.2 is about a sale of the firm to "another party", implying that De Wet either would not or could not exercise her right of first refusal to buy it, as provided for in clause 11. This is a sort of compensation for not being able to enjoy a commercial interest in the firm. What is this sort of benefit doing in this clause? Moreover, clause 12.2 addresses termination of employment "within the firm" upon such a sale, and does not exclude continued employment with "another party". When that benefit is called a "severance package" could the meaning of the phrase have been intended to mean "severance package" as known within a traditional retrenchment scenario? I think not.

32.5. The computation of the quantum in clause 2.3 does not adopt the traditional retrenchment scenario of a multiple number of weeks per year of service. A much more generous benefit is envisaged. The implication of a guaranteed exit benefit rather than a traditional retrenchment benefit is plain.

32.6. Reading these provisions holistically, it must, in my view, follow that clause 12 addresses benefits that will accrue to De Wet upon termination in two circumstances, first the sale of the business to a stranger and second, the termination *simplicter* of her employment. Clause 12.1 governs the further two clauses and must be read in a way that is compatible with both eventualities. Both payments are described as a "severance package". In that context, what basis might exist to intrude into the use of the phrase as used in clause 12.1 a meaning tied exclusively to a traditional retrenchment benefit payable on a loss of a job at the instance of the employer? In my view, none at all.

[33] It is argued that the meaning of the phrase "...is terminated for any reason other than gross dishonesty" contemplates an exclusively employer initiated "termination". There is no doubt that an employer-initiated dismissal would be covered by the phrase. But that conclusion is unimportant. The true question is

whether it can also bear the meaning that it can be a termination at the instance of either party. The utilisation of the neutral term "termination" leaves that open. The word "termination" describes a result not a rationale. If it is to be married to a particular and exclusive rationale, that would need an express articulation of that rationale to be read in a restricted way. In this text there is nothing that promotes that conclusion. Moreover, in the absence of a clear indication that the "termination" was exclusively a "dismissal" the notion of exclusivity cannot be sustained.

[34] Accordingly, clause 12 does not require a termination at the instance only of the employer, and upon her resignation, De Wet became entitled to the "severance package" in clause 12.3.

[35] The appeal on this claim therefore falls to be dismissed.

Costs

[36] Both parties seek costs.

[37] Because the appellant succeeded on one claim and not on the other, and because the effort expended on each issue was comparable, it seems appropriate that neither party be awarded costs on appeal.

[38] The Labour court granted costs to De Wet. That costs order should be set aside and similarly, the fate of costs on appeal should apply to those costs too.

The Order

(1) The appeal on the leave pay claim is upheld.

(2) The ruling of the Court *a quo* at pages 128-130 of the record is set aside.

(3) The costs order made by the court *a quo* is set aside.

(4) The leave pay issue articulated in the statement of claim paragraphs 14 - 17, and in the statement of defence in response thereto, is remitted to the Court *a quo,* for the resumption of the trial.

(5) The appeal on the severance pay claim is dismissed.

(6) The order of the Labour Court in respect of the Severance Pay Claim is confirmed.

Sutherland JA

Coppin JA and Savage AJA concur with the above judgment

APPEARANCES:

FOR THE APPELLANT: Adv Stelzner SC
Instructed by B Schiff – Bagraims Attorneys

FOR THE RESPONDENT: Adv De Kock
Instructed by R Carelse – Carelse Khan Attorneys