

SOUTH AFRICA / JUDGMENT

Hartley v SMD Trading Group CC

(D138/21) [2024] ZALCD 16; (2024) 45 ILJ 2561 (LC) (26 June 2024)

[2024] ZALCD 16

COURT
Labour Court Durban

BEFORE
S Snyman

CASE / FILE NUMBER
D138/21

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FLYNOTES:

LABOUR – Leave pay – Accrual
of leave –
Substantial
and unilateral reduction in salary of employee – Not
permissible without agreement – Breach of contract
shown –
Employee entitled to payment of difference in salary –
Employee failing to prove quantum of leave pay
– No
provision for unlimited accrual of leave – Employee can only
accrue 15 days' leave pay – Employer
paying leave pay
of 15 days on reduced salary rate – Employee entitled to
difference in leave pay based on actual salary.
THE LABOUR COURT OF
SOUTH AFRICA, DURBAN
Reportable
Case no: D 138 / 2021

In the matter between:

IVAN
HARTLEY
Applicant
and
SMD TRADING GROUP
CC
Respondent

Heard:

14 –
15 March 2024

Delivered:	26 June 2024 This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 26 June 2024
Summary:	Contract claim – substantial and unilateral reduction in salary of employee – constitutes breach of contract Contract – verbal agreement to reduce salary – principles considered – no evidence of agreement / consensus with regards to salary reduction – evidence shows unilateral reduction – unilateral reduction of salary without agreement not permissible – breach of contract shown – employee entitled to payment of difference in salary Leave - pay – evidence considered – employee failing to prove quantum of leave pay – no agreement between parties on quantum of leave pay proven – default position under BCEA applies – no provision for unlimited accrual of leave – employee can only accrue 15 days' leave pay Leave - pay – employee not entitled to leave pay as claimed – employer paying leave pay of 15 days on reduced salary rate – employee entitled to difference in leave pay based on actual salary Mora - interest – claim for the payment of salary and leave pay – is claim arising from contract of employment that must still be determined – Prescribed Rate of Interest Act – section 2A considered – applicant only entitled to interest from date when claim was referred Costs – contract dispute – ordinary principle of costs in employment disputes does not apply – employee partially successful – entitled to 50% of taxed costs scale A

JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter was brought by the applicant to this Court by way of a statement of claim filed in terms of Rule 6 of the Labour Court

Rules.[1] It was brought in terms of section 77(3) of the Basic Conditions of Employment Act (BCEA)[2], as a claim concerning the contract of employment of the applicant. The claim is opposed by the respondent, who filed an answering statement.[3]

[2] The matter was set down before me for trial on 14 and 15 March 2024. It concerned two claims postulated by the applicant. The first was a claim based on breach of contract, in that the respondent substantially reduced his salary without his agreement. The second claim was that the respondent breached his employment contract and the BCEA by failing to pay him the leave pay he was entitled to on termination of employment. The applicant also claims interest on any amounts found to have been payable to him, calculated from the date when these amounts were originally due.

[3] I will now proceed to decide these claims by first setting out the relevant background facts.

Background facts

[4] The applicant had been employed by the respondent as dealer principal for its Land Rover franchise in Umhlanga, having commenced employment on 1 April 2013. Because of the nature of the dispute in this case, it is of some importance to set out how the applicant came to be employed by the respondent.

[5] The principal member (shareholder) of the respondent, at the time when the applicant became employed there, was Sean Duminy (Duminy). In 2013, when the applicant was approached by Duminy with regard to the applicant possibly taking up a position at the respondent, the applicant had been employed by Ritchie Motors in Richards Bay for some 18 years. It was undisputed that the applicant and Duminy were familiar with each other when the approach was made.

[6] The applicant agreed to join the respondent, however subject to the condition that his salary and conditions of employment he had at Ritchie Motors would be unchanged. Duminy agreed to this. On the common cause facts, this meant that the salary he earned at Ritchie Motors would remain the same upon joining the respondent. There was however a dispute between the parties as to the leave the applicant would have been entitled to at this point in time, with the applicant contending that he would be entitled to 20 days paid leave, which he received at Ritchie Motors. This will be dealt with later in this judgment. In terms of the evidence, it

appeared to be undisputed that an employment contract was signed between the applicant and the respondent at the time, however this contract had been lost and was not produced in Court.

[7] It was also agreed between the applicant and Duminy that the applicant would become a member (shareholder) in the respondent, meaning that in essence, he would be a partner in the business. He would be allocated a 10% membership interest, for which he would pay R8 million over a period of five years. There was some evidence presented about how the applicant was to pay for this membership and why he came to give it up, but none of this is of relevance in deciding this case. In the end, however, the purchase price for the membership interest was not settled, and the applicant resigned as a member in June 2018. Therefore, and as of June 2018,

the applicant was an ordinary employee of the respondent, and not a member or 'shareholder', as the respondent also termed it.

[8] In the course of 2018, the respondent was subject to some financial challenges. ABSA instituted legal proceedings against Respondent for the repayment of a loan to the respondent. The applicant, together with all the other members of the respondent, has signed surety for this loan by ABSA. It was common cause that in several meetings with ABSA, and in exchange for Duminy pledging other

tangible security to ABSA, the applicant was released from the sureties he had provided to ABSA whilst he was a member of the respondent.

[9] It was undisputed that at the end of 2018 / beginning 2019, there was the possible acquisition of the respondent by Ballito Motor Holdings (BMH), which would resolve the bulk of its financial difficulties. But in order to make the sale palatable, the respondent needed to drastically reduce expenses, and in particular, its salary liabilities. In January 2019, there was a meeting between the applicant, Duminy, Sean Findlay (Findlay) and Sadek Goolam (Goolam). Findlay and Goolam were the other two minority members in the respondent at the time. Goolam held the position of general manager, and Findlay was the dealer principal of the other franchises

of the respondent. Although the applicant was no longer a member, he was regarded a sufficiently senior to be invited to this meeting. In this meeting, it was raised that the salaries of all four of them had to be reduced. It is one of the core issues in dispute in this case whether there was any deliberation on the possible salary cut in this meeting between the four attendees, and whether the applicant then agreed to the cut. This will be dealt with later in this judgment. Suffice it to say, the applicant received his ordinary monthly salary at the end of January 2019, which at the time was R228 500.00. It was common cause that this was his contractual salary prior to these discussions in January 2019.

[10] There were no further meetings or discussions with regard to salary reductions after the meeting in January 2019. When the applicant received his payslip in February 2019, he noticed that his salary had been reduced from R228,500.00 to R75,000.00, being by some

67%, or by R153 500.00. It was also common cause that the salaries of Duminy, Findlay and Goolam were reduced. In the case of Duminy, his salary was reduced from R405 500.00 per month to R365 000.00 per month (an amount of R40 500.00). Goolam's salary was reduced from R100 000.00 per month to R75 000.00 per month (an amount of R25 000.00 per month). Finally, Findlay's salary was reduced from R155 000.00 per month to R120 000.00 per month (an amount of R35 000.00). This was clearly way out of proportion with the salary reduction meted out to the applicant.

- [11] The applicant confronted Duminy about this salary reduction shortly after receiving his payslip. It is in dispute as to what happened in the discussion between the applicant and Duminy about this. According to the applicant, he told Duminy that if that was to be his salary cut, he would need to consider his future, to which Duminy responded that he should do what he needed to do. Duminy disputed that he said this, but did concede that the applicant expressed his dissatisfaction about the salary cut.
- [12] According to the applicant, he resigned at the end of March 2019 by e-mail, indicating that the reason why he resigned was because of his substantial salary cut. This e-mail resignation was however not introduced into evidence. Duminy testified that he could not recall receiving such an e-mail resignation. What was however part of the evidence was an e-mail circulated by the applicant to all his customers, contracts, suppliers and staff, on 2 April 2019, indicating that he had resigned and that he would be taking an extended break before deciding the way forward. It was however common cause, in terms of the pre-trial minute, that the applicant did resign with effect from 30 April 2019.
- [13] On 15 April 2019, the applicant addressed an email to Goolam setting out what the applicant contended was his accumulated leave pay, which according to the applicant amounted to 73 days. This was based on his entitlement of 20 days' leave over the six years he was employed at the respondent, less actual leave taken in this period. This e-mail was sent in the context of some discussions between the applicant, Duminy and Goolam about what leave was owing to him, and what leave he had taken, the exact content of which discussions was in dispute and will be dealt with later in this judgment. There was however no response forthcoming from either Goolam or Duminy to the e-mail of 15 April 2019. Suffice it to say, this amount in leave pay demanded by the applicant was not paid to him.
- [14] What was however common cause was that Goolam, who was responsible for leave administration, sent an e-mail to all the managers in the respondent, including the applicant, on 29 July 2016, concerning 'Staff Leave Days'. In this e-mail, it was indicated that no staff can accumulate more than 15 days' leave. It was further indicated that all leave over and above this amount will be forfeited automatically. The applicant admitted he was aware of this and that it applied, but stated that this did not apply to him specifically, as he was not a member of staff but a shareholder.

- [15] The applicant testified that at the time of the termination of his employment, Duminy agreed to pay his leave pay due, calculated at 73 days, in instalments. Duminy disputed he had ever so agreed. This issue will also be dealt with later in this judgment. What was in evidence was an email addressed by the applicant to Duminy on 4 September 2019, in which the applicant *inter alia* suggested that they should convert what the applicant called their 'handshake agreements' to writing (this referred to issues unrelated to the case at hand), and that the respondent should consider making a payment of the leave pay in instalments of R40 000.00 per month based on the leave schedule provided to Goolam. There was no answer to this e-mail. According to the applicant, this e-mail was sent based on an agreement he had concluded with Duminy, which Duminy, needless to say, disputed.
- [16] There was also testimony by the applicant and his wife, Sonja Hartley (Sonja), that Sonja visited Duminy of her own accord in November 2020 and that Duminy offered in that meeting to pay the leave pay on the basis of monthly instalments of R20,000.00 each, and in the event of a 'bad month' (whatever this may mean), a sum of R10,000.00. Duminy again disputed that there was ever such a discussion or offer. There was a WhatsApp exchange between Sonja and Duminy on 16 November 2020 presented in evidence, seeking to establish this agreement, and this exchange will be dealt with later in this judgment as to whether it in fact establishes any such agreement.
- [17] It was common cause that in the end, the respondent paid the applicant 15 days' accumulated leave pay. However, the leave pay was calculated at the reduced salary of R 75 000.00 per month, with the amount paid being a sum of R52 734.37.
- [18] On 14 January 2021, the applicant's attorneys sent a letter of demand to the respondent. This letter of demand only related to the leave pay allegedly due to the applicant. Reference was made to the allegation that Duminy had agreed to pay the leave pay as demanded by the applicant, but in instalments, which the applicant had accepted. However, and according to the applicant, because he was not paid any of the agreed instalments, he demanded the full payment of his leave pay within seven days of the demand, which according to him, exceeded R800 000.00. The respondent answered on 18 January 2021, disputing the claim, and referring to the policy applicable in the respondent that no staff member can accrue more than 15 days' leave. The respondent also contended that during the applicant's tenure as shareholder, he did not accrue any leave, as shareholders did not accrue leave.
- [19] The applicant then launched the current proceedings on 18 March 2021, demanding his unpaid leave pay, and short payment of his salary for the months of February, March and April 2019. I will now proceed to decide these claims, starting with the salary claim.

The salary claim

- [20] As touched on above, whilst it was common cause that a contract of employment was concluded between the applicant and the respondent, that contract was unfortunately not placed before Court. According to the applicant, the respondent was to blame for this. The applicant testified that he gave all his personal documents to one Mohamed Zaid Noordeen (Noordeen), a former employee of the respondent in the capacity of dealership accountant (currently employed as a director of MSF Consulting), to attend to his taxation affairs. The applicant contended that Noordeen was in possession of his file containing all his documents and had instructions from the respondent not to disclose the file. Noordeen, who testified for the respondent, had a different take on things. He stated that he never received a personal file from the applicant as he would never require this to do the taxes of the applicant. Noordeen did say that he looked for the applicant's personnel file at the respondent, but was unable to find it, because it was probably at BMH when human resources moved there after the sale and BMH had lost it.
- [21] I mention the above for the sake of being complete, as I do not believe anything turns on who is to blame for the applicant's lost employment contract and personnel file. The fact is that the applicant has the onus to prove the terms of his employment contract. In the absence of the applicant providing a written instrument such as a contract of employment to prove this, the terms of the agreement must be proven by way of viva voce evidence. In this context, the evidence presented by both parties as to the terms of the employment contract only related to two issues, firstly being the issue of the applicant's salary and secondly being the applicant's leave entitlement.
- [22] The applicant's contractual salary, in the end, was undisputed. As at the end of 2018, and before the events giving rise to this matter arose, the applicant, as dealer principal for the Land Rover franchise of the respondent, earned R228 500.00 per month. It was also common cause that the applicant was not paid this monthly salary for the months of February, March and April 2019, but was only paid R75 000.00 per month for those three months. Prima facie, that would constitute a breach of the applicant's employment contract by the respondent, and would be all the applicant would need to prove in order to succeed with a claim for damages in an amount equivalent to the unpaid portion of his salary for those three months.
- [4] As held in *W L Ochse Webb and Pretorius (Pty) Ltd v Vermeulen*[5]:

'... The respondent was confronted with a proposed new remuneration package which was in conflict with one of the material terms of his original contract of employment. Although he was given the opportunity to suggest another alternative, it was clear that any alternative would also necessarily have had to be one that was in conflict with what he was entitled to in terms of his original contract of employment. The appellant's conduct in confronting the respondent with this choice of alternatives showed 'a deliberate and unequivocal intention' not to be bound to respondent's previous remuneration package. This constituted a breach of contract, in the form of repudiation, on its part (See *Van Rooyen v Minister van Openbare Werke & Gemeenskapsbou* 1978

- (2) SA 835 (A) at 845A-B). The respondent elected to accept this repudiation and resigned. At common law he would have been entitled to claim damages flowing from the appellant's breach of contract.'
- [23] The evidentiary burden then shifted onto the respondent to provide a defence to this claim. In this regard, the defence sought to be offered by the respondent was a simple one. According to the respondent, the contract of employment was changed by way of a verbal agreement concluded with the applicant in January 2019, to reduce his salary from R228 500.00 per month to R75 000.00 per month. A further related defence was that the applicant somehow acquiesced in being paid this lesser salary.
- [24] Was such a verbal agreement proven? Answering this question centres around what transpired in the meeting in January 2019 between the applicant, Duminy, Goolam and Findlay. It was common cause that at the time, the respondent was in financial difficulties, and that a sale of the business to BMH was being contemplated. It was also common cause that in this meeting, Duminy indicated that there existed a need for salaries to be reduced.
- [25] According to the applicant, and in the meeting in January 2019, no mention was made regarding how much salaries needed to or would be reduced. He testified that no figure was ever mentioned to him as a salary reduction, and he was never asked to agree to it, nor did he agree to it. The applicant also pointed out that the reductions made from the salaries of the other three participants were between 10% and 30%, and stated he would never have agreed to a 67% reduction, which is how much his salary was reduced by. The applicant added that he was not averse to a salary reduction, provided that it be properly discussed with and agreed to by him, which did not happen.
- [26] The applicant, following the meeting in January 2019, was unaware his salary would be reduced, as he still received his ordinary full salary at the end of January 2019. The first he realised that his salary was reduced was when he received his February 2019 pay slip and saw the salary reduction of some 67%. According to the applicant, he then immediately addressed this with Duminy, and told Duminy that if this was what he was going to be paid, he would consider his future options, meaning that he would have to consider resigning. The applicant testified that Duminy answered by saying that the applicant must do what he felt he had to do.
- [27] The applicant testified that as it became clear that Duminy would not reconsider the issue of his salary, and despite him having no other employment prospects at the time, he decided to resign. He testified that he sent an e-mail resignation to Duminy at the end of March 2019 (copied to the other two members of the respondent as well), because he was unable to accept the material reduction in his salary. This letter of resignation was not placed in evidence before Court. What was in evidence was an e-mail sent by the

applicant on 2 April 2019 to a long list of clients, business associates, colleagues and the like, indicating that he would be

taking a break of sorts before deciding what to do next. The applicant stated this e-mail of 2 April 2019 was not his resignation

letter, but a courtesy letter to interested parties.

[28] Goolam and Duminy testified for the respondent with regards to what transpired in the meeting in January 2019. According to Goolam, and because of the financial difficulties of the respondent, it was decided by all four the participants in the meeting (including the applicant) that each of their salaries had to be reduced. Goolam also mentioned the potential transaction with BMH, and that in the context of that transaction, salaries had to be brought in line with industry norms. Importantly however, Goolam stated that in the meeting of January 2019, it was never discussed by how much salaries would be reduced. He testified that it was only

resolved that salaries had to be reduced, however this reduction would be determined by job descriptions and industry norms. This

evidence certainly accords with that of the applicant that the quantum of salary reductions was never mentioned or discussed in this meeting, and certainly not agreed to.

[29] Goolam next stated in his testimony that there was a second meeting in February 2019 between the same four participants, in which the actual quantum of salary reductions was discussed, and then agreed to. This was because the issue of industry norms, referred to in the meeting in January 2019, had now been investigated and determined. The difficulty with this version now offered for the first time is that it was never pleaded. According to the respondent's answering statement, there was only one meeting, and that meeting took place in January 2019, where the actual salary reductions was also discussed and agreed to. It is impermissible to offer a version in evidence never pleaded, especially considering the applicant was legally assisted throughout.[6] And added to this, it was never put to the applicant under cross examination that there was a second meeting in February 2019 where he agreed to the quantum of his salary reduction, which further puts this version by Goolam into question.[7]

[30] According to Goolam, the applicant had resigned, not because of his salary, but because he had been in the industry for a long time, and now wanted to go and do something else. Although this version was pleaded by the respondent, it was also never put to the applicant under cross examination.

[31] Under cross examination, Goolam made a number of pertinent concessions. He conceded that no minutes were taken of the meetings he referred to and no resolutions were passed. He also conceded that if the actual amount of the salary reduction of the applicant was not discussed, it could not be said the applicant had agreed to the salary reduction. He also stated that in determining what he called industry standard (norms) salaries, he of his own

accord telephoned his contacts in the industry in the course of January 2019 to determine what would be appropriate salaries, and that the applicant was not involved in this so-called investigation at all.

- [32] Duminy also testified about what transpired in the January 2019 meeting. He also referred to the precarious financial position of the respondent, the pending BMH transaction, and the need to reduce expenses. He testified that cutting expenses would also include reducing the salaries of the four of them.
- [33] According to Duminy, and in the meeting in January 2019, the specific reductions in salaries that was envisaged was discussed. He testified that it was also discussed how these reductions were arrived at, or in other words, the basis of and motivation for the reductions. After this discussion and considering what was tabled, everyone, including the applicant, agreed to the salary reductions. The problem with this version is that none of it was put to the applicant under cross examination to answer. And worse still, it directly contradicted the testimony of Goolam about what happened in the January 2019 meeting, which Duminy sought to then disavow by saying Goolam was ‘mistaken’.
- [34] Duminy did concede that everyone, especially Findlay, was disgruntled with the situation, but nonetheless agreed. He stated that in the meeting of January 2019, it was discussed that Findlay would in fact become the applicant’s superior and that the applicant’s responsibilities would be reduced by 50%, hence the higher reduction in the applicant’s salary. Again, none of this was put to the applicant under cross examination, nor was it pleaded in the answering statement. But what Duminy did concede is that the ‘survey’ that was conducted to determine the benchmark of salaries in the industry was done by himself and Goolam, and did not involve the applicant. Considering when this so-called ‘survey’ was done, its results would not have been known in the January 2019 meeting, which is what was alluded to by Goolam in his testimony.
- [35] Duminy also testified about the applicant’s resignation. He conceded that the applicant did come to see him about wanting to resign, however he never told the applicant that he must do what he felt he had to do. According to Duminy, he in fact pleaded

with the applicant to stay, as it was envisaged that the applicant would earn substantially more in commissions, but the applicant

declined. This is yet again another version never put to the applicant under cross examination, nor pleaded.

- [36] Under cross examination, Duminy materially contradicted himself where it came to the issue of the reasons for the applicant’s resignation. He conceded that the applicant did say that one of the reasons he resigned was because of his salary reduction. Duminy however added that the applicant also said that he was resigning because he could not get along with Findlay, which, in a pattern that kept emerging as the matter went along, was not put to the applicant under cross examination. Further, this testimony of Duminy contradicts what has

been pleaded by the respondent in the answering statement as to the reason for the applicant's resignation, where it is said that the applicant resigned to pursue other business ventures.

[37] So, and in a nutshell, the applicant's version, in evidence, was that a salary reduction was not discussed or agreed to in the meeting of January 2019, whilst the respondent's version was that it was discussed and agreed. So which versions prevails? In Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others[8] the Court succinctly set out how such mutually contradictory and irreconcilable versions should be determined and resolved, as

follows:

'... The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. ...'

[38] Starting from a credibility perspective, I have little hesitation in preferring the evidence of the applicant in this regard. His

testimony was concise and consistent, and he did not contradict himself or his pleadings. As opposed to his testimony, Goolam and

Duminy fared poorly.[9] There was the material contradiction in the evidence of Goolam and Duminy as to when the applicant was supposed to have agreed to his salary reduction. Both of them also contradicted the respondent's answering statement, especially on the issue of the reasons why the applicant resigned. Several material aspects of Goolam and Duminy's testimony as to what was even discussed when the salary reduction came up in the meeting of January 2019 was never put to the applicant under cross examination, having the consequences that the applicant's testimony must be accepted. As held in President of the Republic of South Africa and Others v South African Rugby Football Union and Others[10]:

'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her

character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn and has been adopted and consistently followed by our courts.'

[39] But a case is not decided simply on credibility. It is also essential to consider the probabilities. The determination of probabilities

entails an inference to be drawn from the evidence as a whole, on the basis of what the Court said in *SA Post Office v De Lacy and Another*[11], being the following:

‘The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be ‘consistent with all the proved facts. If it is not, then the inference cannot be drawn’ and it must be the ‘more natural or plausible, conclusion from among several conceivable ones’ when measured against the probabilities.’

[40]v I am satisfied that on the probabilities, the applicant would never have agreed to such a salary reduction, for a number of reasons. First, I simply cannot accept that the applicant would accept a salary reduction of R153 500.00 per month off a base of R228 500.00,

when Duminy only had a salary reduction of R40 000.00 off a base of R405 500.00, Goolam a salary reduction of R25 000.00 off a base of R100 000.00, and Findlay a salary reduction of R35 000.00 off a base of R155 000.00. I am quite sure that if this was discussed, the applicant would have loudly protested. Secondly, Goolam and Duminy both testified that they arrived at the amounts the salaries were to be reduced, by way of their own ‘surveys’ which did not even involve the applicant. These surveys were conducted only after the meeting in January 2019, and could thus not have served as basis for the discussion of salary reductions in the meeting of January 2019. Third, the complete absence of a minute or at least some kind of resolution to document such a material decision cannot be ignored. And finally, as of 2018 already, the applicant was no longer a member (shareholder) of the respondent and only an ordinary employee, and thus would derive no benefit from the BMH transaction, considering the salaries of all the other employees in the respondent were not reduced. The following dictum in *Cooper and Another NNO v Merchant Trade Finance Ltd*[12] is in my view apposite in casu:

‘... If the facts permit of more than one inference, the Court must select the most “plausible” or probable inference. If this favours the litigant on whom the onus rests he is entitled to judgment ...’

[41] It should also be considered that in terms of the BCEA, the duty is squarely on the respondent to keep and maintain proper salary records, and that would include a record of salary increases or reductions. In terms of section 29(1) of the BCEA, an employer must supply an employee, when the employee commences employment, with a number of listed particulars in writing, which includes, in section 29(1)(f), the employee's wage or the rate and method of calculating wages. In terms of section 29(2), when any matter listed in subsection (1) changes, the written particulars must be revised to reflect the change and the employee must be supplied

with a copy of the document reflecting the change. Accepting that there was a contract of employment signed between the parties, as appears common cause between the parties, the change to the applicant's salary would constitute a variation of what is

contemplated by section 29(1)(f), but the applicant was not provided, in writing, with the particulars of such change. This also works against the notion that an agreement was concluded between the parties in this regard.

[42] It is true that the issue of a salary reduction per se was raised in the January 2019 meeting, and the parties may have been ad idem that this would be necessary going forward. But this broad consensus and willingness of the applicant to consider it, can never serve to establish an actual agreement between the applicant and the respondent on an actual pay reduction of R153 500.00 per month.[13] In simple terms, a broad consensus that a pay reduction is necessary, has little value and no enforceable independent existence without the actual reduction itself being tabled and agreed to. In *Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd*[14] the Court said:

‘The second insuperable obstacle to the success of the appeal is the absence of the substance necessary to constitute an enforceable

contract. Inherent in the *Alsthom* judgment (at 92E) is the qualification that unless the terms upon which a party relies for the supposed agreement have an independent

meaningful existence (ie divorced from any terms left over for later negotiation), there is scant possibility, if any, of deciding that a binding agreement has come into being’[15]

[43] The Court in *Pitout v North Cape Livestock Co-Operative Ltd*[16] referred with approval to the following reference works:

‘... Williston, *Contracts*, 3rd ed., vol. 1, sec. 27, p. 61, draws a similar distinction by saying:

"Frequently negotiations for a contract are begun between parties by general expressions of willingness to enter into a bargain upon stated terms and yet the natural construction of the words and conduct of the parties is rather that they are inviting offers, or suggesting the terms of a possible future bargain, than making positive offers."

And so, too, *American Jurisprudence*, 2nd ed., vol. 17, sec. 25, p. 360:

"Broadly speaking, preliminary negotiations as to the terms of an agreement do not constitute a contract, although this does not preclude the formation of a binding contract during negotiations. The nature of the particular acts or conduct and the surrounding circumstances are to be considered to determine whether there was in fact a contract, in solving the problem of interpretation which arises where it is claimed that a contract was made during negotiations."

The Court concluded as follows, which in my view is quite apposite in casu:[17]

‘... The onus was upon respondent to establish that the undertaking constituted a concluded contract. In view of all the circumstances and for the reasons stated above, I am not persuaded that there is a preponderance of probability in respondent's favour. I think

that all the evidence adduced and accepted by the trial Court is equally susceptible of the interpretation that the undertaking was proffered not as an offer with the intention of concluding there and then a final contract but merely as a proposal in the course of negotiations which, if successful, would no doubt have led to a conclusion of a final contract ...’

[44] So, at best for the respondent, it established a willingness on the part of the applicant to consider a pay reduction. But it fell far short of establishing an actual agreement in this regard. The evidence the respondent sought to present in support of its case can best be described by quoting the following dictum in *Rooyendal (Pty) Ltd v Minister of Land Affairs*[18]:

‘To sum up, the viva voce evidence presented on behalf of the appellants in respect of the conclusion of the alleged agreements relating to input costs is vague and contradictory; the appellants could not state when precisely any of the oral agreements had been reached or for which of them Ms Boshoff and Mr Hohls was acting; the documentary evidence tendered in support of the appellants' claims is inconclusive and the probabilities favour the respondents ...’

[45] The above being the sum total of the testimony relating to whether the applicant agreed to the reduction of his salary, I am compelled to say that I do not believe the applicant ever agreed to such reduction. I believe that what happened was that the applicant was called into the meeting in January 2019 with the three members of the respondent, where it was discussed that there would have to be salary reductions because of the respondent's precarious financial position and to make the transaction with BMH more palatable to BMH. There was never a discussion about the quantum of the salary reductions, nor was such a proposition ever placed before the applicant to agree to. It was simply unilaterally implemented after the end of January 2019, and after Duminy and Goolam unilaterally phoned around to decide what was industry norms, which according to them would determine what was to be the reduction. This constituted a breach of the applicant's contract of employment.

[46] Therefore, the respondent, by unilaterally reducing the applicant's salary by some 67% (R153 500.00), breached his contract of employment, which entitled him to terminate the contract by resigning and then claiming damages. These damages would be the difference between what the applicant was entitled to earn, and what he was paid, for the remaining three months of his employment (which includes notice). This amounted to a total sum of R460 500.00.

[47] This leaves only the issue of the applicant supposed acquiescence in the pay reduction meted out to him. As far as the applicant was concerned, he acquiesced in nothing, and as soon as he saw his payslip at the end of February 2019, he confronted Duminy about it, threatening to resign. Duminy did not dispute that the applicant came to him indicating his

intention to resign, and ultimately conceded that the pay reduction was mentioned as at least one of the reasons for the applicant intending to resign. The applicant made it clear he resigned because of this substantial pay reduction, and for the reasons already mentioned, there is no reason not to accept the applicant's testimony in this regard. All this being the case, it is my view that the applicant took the necessary action to contradict the breach, at the first reasonable opportunity after becoming aware of it, which would dispel any notion of acquiescence.[19]

[48] The respondent's own evidence in support of the applicant's supposed acquiescence is equally unconvincing. Goolam testified that the applicant told him that he (the applicant) was resigning because he wanted to do something else, but this was never put to the applicant in cross examination. As said, Duminy conceded under cross examination that the applicant did give his pay reduction as 'one of the reasons' for resigning, with the other reason being that the applicant could not get along with Findlay (again never put to the applicant under cross examination). The testimony of Goolam and Duminy as to why the applicant resigned contradicted the pleaded

reasons.

[49] The respondent sought to rely on the e-mail of 2 April 2019, to illustrate the reason for the resignation as unrelated to the pay reduction. In that e-mail, the applicant recorded that he would be taking a break before deciding what to do next. However, the

simple answer to this must be that this e-mail is not a resignation directed at the respondent's members, and in particular Duminy. It is a general communique sent to everyone on the applicant's contact list, so to speak, informing of his departure from the respondent. It even includes his wife. Obviously, the applicant would not in such a communique favour all and sundry as to the real reason for his departure as being a substantial pay reduction. That would not be something you share with third parties.

[50] What however stands way above water is the fact that the applicant had spent some six years working for the respondent, in a senior

management position and earning a substantial salary, in the only industry he knows and spent a lifetime in. There was no cause or reason for him to resign, out of the blue, to take a break or pursue other interests or whatever. The only change in circumstances that ever happened is the unilateral and material reduction in the applicant salary, as apparent to him from the end of February 2019. The applicant resigned within a month after that, without any alternative prospects of employment or income. There was nothing else that may have caused him to resign. On the probabilities, he resigned because of this pay reduction. It can thus hardly be said that he acquiesced in this reduction. As held in *Marquard & Co v Biccard and Another*, [20] 'very strong evidence' would be needed to establish such acquiescence, which simply does not exist in this case.

[51] I am therefore satisfied that the applicant has proven a breach of his contract of employment as a result of the unilateral and material pay reduction meted out to him, and that he cancelled the contract of employment as a result, as he was legally entitled to do. He is accordingly entitled to claim damages for such breach, which he did. The damages he suffered is readily ascertainable, being the difference in salary between what he would have earned, as opposed to the salary that he was paid, for the three months up to the cancellation of the contract. This difference being R153 500.00 per month, it amounts to a total of R460 500.00,

which is hereby awarded to the applicant.

The leave pay claim

[52] As referred to earlier in this judgment, the applicant contends that he was owed 73 days' leave pay at the time of termination of his employment. The respondent, on the other hand, contended that the applicant was only entitled to 15 days' leave pay, which was subsequently paid out to him.

[53] In the absence of a contract of employment stipulating otherwise, it would be the provisions of the BCEA that determines the entitlement of an employee to paid annual leave. In section 20(1), an 'annual leave cycle' is defined as the period of 12 months' employment with the same employer immediately following an employee's commencement of employment, or the completion of that employee's prior leave cycle. In terms of section 20(2), an employer must

grant an employee at least 21 consecutive days' annual leave on full remuneration in respect of each annual leave cycle.[21] And finally, section 20(4) stipulates that an employer must grant annual leave not later than six months after the end of the annual leave cycle. It is not permissible to pay an employee in lieu of taking leave,[22] save only in the case of termination of employment, when an employee shall be paid for any annual leave not taken that is due in terms of section 20(2).[23]

[54] The above being the default position, for the want of a better description, how does the applicant's case then differ? Answering this question, in the absence of a written contract of employment, must start with considering the applicant's own testimony. According to the applicant, and when he started employment with the respondent, he insisted that he must receive the same 'conditions of employment' he had at Richie Motors, where he was employed before, which Duminy agreed to. He testified he was entitled to 20 days' leave at Richie Motors. He further testified that when he then received the contract of employment relating to his employment at the respondent to sign, it reflected 15 days paid leave, and at his insistence, it was specifically changed to 20 days. His evidence

in this respect is at least clear.

[55] However, and where it comes to whether the applicant's leave conditions included an unlimited accumulation of leave that was not taken by him, his own evidence is far less clear. He led no evidence whatsoever on any discussion with Duminy at the time of starting employment with the respondent about whether he would be entitled to an unlimited accumulation of leave. He never testified that he was entitled to such benefit at Richie Motors. He certainly did not produce his contract at Richie Motors to prove this. It would appear that this issue did not feature at all. Under cross examination, the applicant conceded that all he asked for when joining the respondent from Richie Motors was that his conditions of employment 'remain the same', and there was no discussion about leave accumulation. The applicant testified that in this initial discussion with Duminy, he showed Duminy his IRP5 at Richie Motors to confirm his salary. However, an IRP 5 does not show leave entitlement or leave regulation. It was undisputed that Duminy never saw the applicant's contract of employment at Richie Motors. All this has the result that, in my view, the existence of any agreement on the issue of leave accrual / accumulation is not established.

[56] The applicant testified that in a second meeting at the time of his commencement of employment, he was given a contract of employment, however this contract reflected 15 days' leave. It is then that the applicant asked for it to be changed to 20 days, which was done. It is clear that there was no discussion of, or change to the agreement, where it comes to leave accumulation / forfeiture.

[57] As opposed to the aforesaid, Goolam testified that the ordinary leave policy in the respondent was that employees are entitled to 15 days' paid leave, that leave may not be accrued, and that any leave not taken is automatically forfeited. This testimony is in line with the e-mail of 29 July 2016, in which this dispensation is specifically recorded. The applicant confirmed that he was aware of this e-mail and did not dispute what was said therein. The applicant however sought to counter this by saying that

this dispensation applied to ordinary employees, and since he was a member (shareholder), it did not apply to him. The problem with this view of the applicant is that whilst it may have held true prior to June 2018, it was no longer the case after that, as the applicant had resigned as a member (shareholder) and in effect became an ordinary employee.

[58] It must also be considered that where it came to the senior employees in the respondent, the evidence, in my view, showed a very lackadaisical approach where it came to them taking leave, and recording leave taken. The applicant testified that he had to complete leave forms, but then conceded he did not complete leave forms for the Fridays he took off. The applicant in any event did not produce any leave forms he may have completed, and never called for discovery of the same. Duminy testified that because of the

applicant's seniority, the applicant was free to take leave when he wanted, did not have to complete leave forms, and was only obliged to inform him (Duminy) if he would be taking leave. Overall considered, I do accept that where it came to the four senior employees in the respondent, leave was taken on a discussion (informing) basis, and the leave taken was not recorded.

[59] Even if it could be said that the applicant was entitled to 20 days' paid leave in a leave cycle, I am not convinced that the applicant has produced sufficient evidence to establish a dispensation of unlimited accumulation of leave. Such a dispensation would in any even run counter to how leave was practically treated in the respondent. Further, the continued accrual of annual leave that is not taken in a particular leave cycle would only be permissible where it comes to what is commonly known as non-statutory leave, which would be the leave over and above the minimum prescribed by section 20 of the BCEA. In casu, this would be the additional five days annual leave, and such leave could never accrue to the extent claimed by the applicant,

considering his total of six years' service.[24]

[60] Where it comes to the leave entitlement of 15 days, this is statutory leave regulated by the BCEA, and as such, it cannot accrue beyond the period of six months following the end of a particular leave cycle. This is evident from the provisions of section 20(1), as read with sections 20(2) and (4), of the BCEA. In *Jooste v Kohler Packaging Ltd*[25] the Court considered an argument that the BCEA does not provide for forfeiture of leave accrued but not taken, and therefore the employee in that case was contended to be entitled to be paid out for the 91 days of leave due in terms of section 20(2) which the employee had not taken at the date of his resignation. In concluding that leave not taken prior to the expiry of the six months' period at the end of the leave cycle is forfeited, the Court reasoned that:[26]

'... In my view, both s 40 and s 12(4) of the respective Acts contemplate payment only in respect of leave accrued in the cycle immediately

preceding that during which termination takes place (apart of course from the pro rata entitlement for the then current cycle). The very purpose of the BCEA is to ensure that an employee takes annual leave. An employer may not refuse him that entitlement. The BCEA contemplates that leave will be taken so that the problem of accumulation does not arise. To permit payment upon termination for statutory leave accumulated from prior cycles would be to allow both the employer and the employee to circumvent the Act, and s 20(2) and s 12(1) of the respective Acts would serve no purpose ...

... the simple answer is that an employee must insist on the rights and benefits to which he is entitled under the Act, and an employer who does not grant those rights can be dealt with under the BCEA itself. Thirdly, to permit the accumulation of leave accrued in past years would thwart the object of the Act and therefore fly in the face of s 2 of the 1997 statute.'

[61] It may be added that the Court in Jooste *supra* drew a distinction between leave as determined by sections 20(1) and (2) of the BCEA, and any additional leave provided for in the contract of employment itself. The Court held as follows in this regard:[27]

‘... In my view, it is perfectly permissible for parties to agree that leave in excess of the statutory minimum may be accumulated, and that the employer is obliged to pay remuneration in lieu of any such leave accumulated, but not taken at the date of termination of employment ...’

[62] I next refer to *Ludick v Rural Maintenance (Pty) Ltd*[28] where the Court was again seized with answering this same question, had decided that the aforesaid ratio in Jooste *supra* was correct, and reasoned as follows:

‘... Mr Wilke'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 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 ...’

The Court concluded:[29]

‘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) ...’

[63] I am aware that in *Jardine v Tongaat-Hulett Sugar Ltd*[30] the Court adopted a different view. The Court held that section 20(4) of the BCEA, as read with section 20(2), seeks to protect employees and concluded as follows:

‘... 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. ...’

In short, the Court in *Jardine* held the view that leave not taken prior the expiry of six months at the end of the leave cycle was not forfeited, and could accrue.

[64] Despite this differing view in *Jardine supra*, it is now fairly settled that the approach adopted in Jooste *supra* is the correct one,[31] and that approach has been consistently applied in a number of later judgments. I refer to *Ludick supra*, *Misra v Ithala Ltd*[32], and *Minnie and Another v Smart Plan CC*[33]. I agree that the approach in Jooste is the correct one, and the finding in *Jardine* is clearly wrong. The purpose of guaranteed annual leave afforded to

employees in terms of the BCEA was never intended to constitute some kind of piggybank for employees to utilise to generate a lucrative cash pay-out when leaving employment. The purpose of affording

employees guaranteed leave is so that employees have the opportunity of guaranteed rest and recuperation, which in turn would actually protect their employment and enhance workplace safety and efficiency, placed at risk by a fatigued employee. Employees must know that they have to take their leave, or else they will lose it. That way, they will be motivated to enforce their rights, take their leave, and the objectives of the BCEA will be achieved.

- [65] For all the reasons set out above, and in my view, any statutory leave not taken by the applicant prior to the expiry of six months after each and every succeeding leave cycle, would be forfeited as a matter of law. The applicant's leave cycle commences on 1 April of each year.[34] Considering he resigned effective end April 2019, he would only have the 15 days leave as found in his current leave cycle, which can still be considered to be extant, and this will be susceptible to being paid out under section 40 of the BCEA. Any statutory leave in prior leave cycles is forfeit.
- [66] Accepting that the applicant had five additional days of non-statutory leave in every leave cycle that can competently accrue, the question now is whether the applicant has proven such accrual, as the applicant bears the onus in this regard.[35] I have referred to the evidence to the effect that in the respondent, the policy is that leave beyond that which is allowed by the BCEA does not accrue. That would certainly cover these five additional non-statutory leave days as well. But despite this, the applicant led no evidence as to how his non-statutory leave may have accrued. For the six years of his employment, his total non-statutory leave would be 30 days. In the e-mail he sent to Goolam on 15 April 2019, the applicant recorded he took 43 days leave in this six years period. The applicant lists individual events for which he supposedly took leave, but does not say when and thus in what leave cycle it was taken. There is no indication if it came out of the statutory leave component or non-statutory leave component. And then there is an amount of 20 days' leave (included in the 43 days) attributed to 'random Fridays', again with no indication when it was taken. What was presented by the applicant, almost as an ipse dixit, is insufficient to prove a leave entitlement of supposedly 73 days.
- [67] According to the applicant, the figure of 73 days was discussed in a meeting between the applicant, Goolam and Duminy, and agreed to. Goolam and Duminy disputed that it was ever accepted and agreed that the applicant was entitled to 73 days' leave pay. It is common cause that Goolam never answered the e-mail by the applicant of 15 April 2019. In his statement of claim, the applicant

pleaded that at the time of his termination of employment, the respondent proposed to pay the outstanding leave pay he demanded in instalments, which he agreed to. He did not plead what these instalments would be. But in his testimony, he said the amount was R40 000.00 per month was agreed to with Duminy at this time, however this is inconsistent with an e-mail by the

applicant to Duminy on 19 September 2019, in which the applicant asks Duminy to ‘consider’ to ‘please remit’ outstanding leave pay in the sum of R40 000.00 per month. The e-mail is more a proposal, and it is common cause Duminy did not respond to the proposal. It was also undisputed that no such instalments were ever paid. Duminy, in his testimony, disputed that there was ever such an agreement, which in my view, considering the above, is more likely. It is my view that the applicant thus did not establish such an agreement.

[68] The applicant then also pleaded a case that on 16 November 2020, Sonja met with Duminy and Goolam, and in this meeting it was agreed that the outstanding leave pay be paid in instalments of R20 000.00 per month (or R10 000.00 per month in the case of a ‘bad’ month). It was pleaded that the applicant accepted this proposal. However, it was unexplained why the applicant

would accept such a proposal if he had already agreed to an earlier instalment of R40 000.00 per month. It is also important to consider that under cross examination, the applicant testified that Sonja approached Duminy without his knowledge, the R20 000.00

instalment was not proposed by him, and what he had agreed to was the R40 000.00 per month instalment. This clearly contradicted the pleaded case.

[69] I also consider in this regard that the applicant, as part of his documentary evidence, submitted a transcript of a WhatsApp exchange between Sonja and Duminy on 16 November 2020, concerning the applicant’s leave pay. In this exchange, Sonja records that Duminy said he would pay R20 000.00 per month in respect of the applicant’s outstanding leave pay. It was suggested by both the applicant and Sonja that this proves the agreement by the respondent to pay the applicant’s leave pay he demanded. But what the applicant did not disclose was Duminy’s final response in this exchange, in which he makes it clear that what

Sonja was recording was incorrect. I take a dim view of this failure to disclose. Even though it was suggested to Sonja in re-examination

that the full WhatsApp exchange had been provided to the applicant’s attorney and not disclosing the full conversation was simply a mistake, the damage had been done. I in any event question this explanation, considering that the applicant re-typed the exchange to fit on a single page, and it was the respondent that produced an actual screen shot of the entire exchange. It certainly creates the impression that the final answer was deliberately left out. In the end, the fact is that the WhatsApp exchange had been presented as proof of an agreement, when in reality, it did exactly the opposite.

[70] However, and as a simple proposition, the testimony revealed that applicant himself suggested that he had an agreement with Duminy to pay the leave pay at R40 000.00 per month, whilst his wife (Sonja) had an agreement with Duminy to pay it at R20 000.00 per month which she did without his knowledge. This is simply a preposterous suggestion, and in my view makes it clear that the allegation that there was an agreement to pay what the applicant demanded was the leave pay due to him, is contrived.

[71] It was common cause that in a meeting between the applicant and Goolam at about the time the applicant left, there was debate that took place around his entitlement to leave pay. That is how the applicant came to adjust his 'random Fridays' figure. Goolam testified that he did not respond to the applicant's e-mail of 15 April 2019, because there were no records to verify what the applicant was saying, and as such, he could never agree with what the applicant was saying. Duminy testified that he never agreed to pay out accumulated leave to the applicant and that as far as he was always concerned, no accumulated leave pay would be paid out. He stated that he was only advised that 15 days' accumulated leave had to be paid out after receiving the statement of case from the applicant's attorneys, which he then did.[36]

[72] I conclude that there is sufficient doubt as to the correctness of the applicant's leave pay calculation, to the extent that it cannot be accepted. It is also highly likely that leave taken by the applicant was not recorded, considering the way in which it was managed with regard to all four the senior employees. That was simply the practice in the respondent. The applicant also never proved when he actually took leave throughout the six years. All said, the applicant simply did not prove he was entitled to 73 days' accrued leave. The following findings in *Welch v Kulu Motors Kenilworth (Pty) Ltd and Others*[37] are apposite:

'... The applicant has placed no evidence before the court as to the number of days annual leave that had accrued to him in either the current leave cycle or the preceding cycle; in particular, there is no firm evidence of the number of days annual leave accrued but not taken in that period. Further, there is no evidence before me as to how or why the amount of R22,115.52 (representing remuneration for 12 working days) fell short of the applicant's contractual entitlement, if it did. The calculations carried out by Mr Stein, his attorney, were not made available. Applicant did his own calculations, initially indicating that he based these on diary entries. It was, however, quite clear that this was not the position and that in respect of 2008 he made some sort of 'allowance' because the diary did not provide meaningful details as to when he was on leave.

For these reasons, the applicant has failed to establish a sufficient evidentiary basis for his claim for the value of annual leave accrued but not taken, and that claim stands to be dismissed.'

[73] In the absence of the applicant being able to prove that he was entitled to the leave pay claimed, the fall-back position is the respondent's own policy as embodied in the e-mail of 29 July 2016, which at least is beyond contestation. That gives the applicant an entitlement to leave pay of 15 days. After all, and as from the end of 2018, he was an ordinary employee, and not a "shareholder". On the common cause facts, he was paid these 15 days' leave pay, albeit at the incorrect

rate, which issue will be dealt with later. Therefore, insofar as the applicant claims that he is entitled to any leave pay beyond this 15 days' worth, his claim must fail.

[74] This leaves only the issue of the calculation of the leave pay of 15 days, which was done by the respondent on the basis of a monthly salary of R75 000.00 and not R228 500.00. The applicant would obviously, in the light of my findings relating to the breach of contract by the respondent where it came to the reduction of the applicant's salary, be entitled to his leave pay being calculated on the basis of the monthly salary of R228 500.00. An entitlement of 15 days' leave pay at R228 500.00 per month amounts to R158 167.97. The applicant was paid R52 734.37, which must be deducted. This leaves a balance of leave pay owing to the applicant of R105 433.60.

Interest

[75] The applicant seeks interest on the amounts payable to him, back dated to the period March to May 2019. However, and where it comes to the claim by an employee party for the payment of disputed salary under the employee's employment contract, it is, in short, an as yet undetermined contract claim, in which the employee party, considering it is a monetary claim, would have to prove his or her damages.[38] That claim would be subject to all the defences in common law that an employer party may legitimately rely upon when defending such a claim.

[76] In casu, what the applicant is seeking would be mora interest, which accrues as a species damages because the respondent had failed to comply with obligations that rested on it in terms of the employment contract.[39] And logically, for mora interest to accrue, the respondent would have to be in mora.[40] As a matter of principle, and because the claim is disputed, the respondent could only be in mora once the Court has determined this claim. [41] However, and despite this, the issue of interest in these kinds of unliquidated claims is dealt with in the Prescribed Rate of Interest Act (Interest Act)[42]. Section 2A of the Interest Act deals with interest on unliquidated debts (claims). Section 2A(1) provides that any unliquidated debt once determined by a Court or an arbitrator shall bear interest as determined by subsection 1.[43] Next, section 2A(2)(a) provides: 'Subject to any other agreement between the parties and the provisions of the National Credit Act, 2005 (Act 34 of 2005) the interest contemplated in subsection (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever is the earlier' (emphasis added).[44]

[77] In short, what all the above means, in the context of a claim for payment of salary under the employment contract, as being an unliquidated claim considering it is contested, is that interest will start running either from the date when payment of the salary is demanded or from the date when proceedings are filed in the Labour Court to claim payment of the salary, whichever is the earlier.[45]

[78] In casu, the only demand emanating from the applicant was the letter of demand by his attorneys on 14 January 2021. But in that letter of demand, the applicant only demanded leave pay, and not damages due to breach of contract. It thus cannot serve as a demand as contemplated by section 2A(2)(a) of the Interest Act. It follows that the date from which

interest shall commence to run would be the date on which the applicant's statement of claim was filed, thus being on 18 March 2021. At that time, the prescribed rate of interest was 7%, and any interest due must be calculated on the basis of such rate.

Conclusion

[79] In summary, the applicant has succeeded in establishing a case of breach of his employment contract where it comes to the unilateral reduction of his salary from R228 500.00 per month to R75 000.00 per month. The applicant is therefore entitled to the payment of contractual damages in the sum of R460 500.00, being the difference in the salary he was entitled to receive and the salary he was actually paid, for the three months of February, March and April 2019.

[80] The applicant has however failed to establish his claim for leave pay in an amount equivalent to 73 days' accrued leave. The applicant is only entitled to accrue 15 days' paid leave, and the respondent, following the filing of the applicant's

statement of claim, paid such leave pay to the applicant, albeit calculated incorrectly. But overall, the applicant's leave pay claim was not successful, and is dismissed.

[81] The amount in leave pay paid to the applicant as a result of the incorrect calculation by the respondent, amounts to R105 433.60. The respondent is accordingly liable to pay this amount to the applicant.

[82] Simple interest shall accrue on both the amounts of R460 500.00 and R105 433.60, at the rate of 7% per annum, calculated from 18 March 2021 to date of payment.

Costs

[83] This only leaves the issue of costs. It is of course true that the claim in this instance is one based on contract, and as such the ordinary principles applicable in employment disputes that costs are not ordinarily awarded, does not apply. Nonetheless, I

have a wide discretion where it comes to the issue of costs, having regard to the provisions of section 162(1) of the LRA. In this

matter, the applicant was only partially successful. A substantial part of his claim was the leave pay claim, which has failed. On this basis, I believe it would be just and equitable that the respondent pays 50% of the applicant's costs, on a party and party basis, scale A.

[84] For all of the reasons as set out above, the following order is made:

Order

1. It is declared that the respondent acted in breach of the applicant's contract of employment.
2. The respondent is ordered to pay the applicant the sum of R460 500.00 (four hundred and sixty thousand five hundred Rand) in damages for breach of contract.

3. The respondent is ordered to pay the applicant the sum of R105 433.60 (one hundred and five thousand four hundred and thirty three Rand sixty Cents) in leave pay due.
4. The amounts payable by the respondent to the applicant in terms of paragraphs 2 and 3 of this order shall be paid to the applicant within 10(ten) days of date of this order.
5. The amounts payable by the respondent to the applicant in terms of paragraphs 2 and 3 of this order shall accrue simple interest at the rate of 7% per annum, calculated from 18 March 2021 to date of payment.
6. The respondent shall pay 50% (fifty per centum) of the applicant's taxed party and party costs, on scale A.

S. Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr J Forster of Forster Attorneys

For the Respondent: Ms Q E Majam of MacGregor Erasmus Attorneys

- [1] Rule 6(1) provides for a claim to be brought by way of a statement of claim and prescribes the requirements for such document.
- [2] Act 75 of 1997 (as amended). Section 77(3) reads: 'The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment,

irrespective of whether any basic condition of employment constitutes a term of that contract.' Further, section 77A(e) provides that the Labour Court has the power to make 'a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3), which determination may include an order for specific performance, an award of damages or an award of compensation'.

- [3] This is done in terms of Rule 6(3).
- [4] See *Mangope v SA Football Association* (2011) 32 ILJ 1132 (LC) at para 20.
- [5] (1997) 18 ILJ 361 (LAC) at 364C-F.
- [6] See *Imprefed (Pty) Ltd v National Transport Commission* [1993] 2 All SA 179 (A) at 188; *Knox D'Arcy AG and another v Land and Agricultural Development Bank of South Africa* 2013] 3 All SA 404 (SCA) at para 35; *Naidoo v Minister of Police and Others* [2015] 4 All SA 609 (SCA) at para 30; *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) at para 11; *Smith v Kit Kat Group (Pty) Ltd* (2017) 38 ILJ 483 (LC) at para 67.

- [7] In *ABSA Brokers (Pty) Ltd v Moshwana NO and Others* (2005) 26 ILJ 1652 (LAC) at para 39, the Court said: ‘... A failure to cross-examine may, in general, imply an acceptance of the witness’ testimony...’. And in *Trio Glass t/a The Glass Group v Molapo NO and Others* (2013) 34 ILJ 2662 (LC) at para 41, the Court held: ‘... The effect of the failure to put such an important issue to the third respondent under cross-examination must mean that this evidence must be disregarded....’
- [8] 2003
- (1) SA 11 (SCA) at para 5. See also *Blitz Printers v Commission for Conciliation, Mediation and Arbitration and Others* [2015] JOL 33126 (LC) at para 37; *Kok v Commission for Conciliation, Mediation and Arbitration and Others* [2015] JOL 32888 (LC); *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 452 (LC) at para 20
- [9] Compare *Accolla v Narandas* 2020 JDR 1224 (KZD) at para 28.
- [10] 2000
- (1) SA 1 (CC) at para 61.
- [11] 2009 (5) SA 255 (SCA) at para 35. See also *Bates and Lloyd Aviation (Pty) Ltd v Aviation Insurance Co* 1985
- (3) SA 916 (A) at 939I-J; *Govan v Skidmore* 1952
- (1) SA 732 (N) at 734A-C; *Food and Allied Workers Union and Others v Amalgamated Beverage Industries Ltd* (1994) 15 ILJ 1057 (LAC) at 1064C-E; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 945 (LC) at para 37.
- [12] 2000
- (3) SA 1009 (SCA) at para 7. See also *Minister of Police v Safety and Security Sectoral Bargaining Council and Others* (2023) 44 ILJ 1017 (LAC) at para 16.
- [13] Compare *Pareto Limited v Coffee Junction* 2011 JDR 0153 (WCC) at pages 12 – 13 of the judgment.
- [14] 1996
- (3) SA 320 (W) at 337B.
- [15] The Court was referring to *CGEE Alsthom Equipments et Entreprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987
- (1) SA 81 (A).
- [16] 1977

- [4] SA 842 (A) 850F-H. See also the insightful discussion in *N&Z Instrumentation and Control v Trolex SA (Pty) Ltd* 2013 JDR 2134 (GSJ) at paras 14 – 20 in this regard.
- [17] Id at 853B-D.
- [18] 2015 JDR 1694 (SCA) at para 27.
- [19] See *South African Motor Racing Co Ltd v Klotz* 1947
- (4) SA 598 (W) at 606.
- [20] 1921 AD 366 at 378. In *Strachan v Lloyd Levy* 1923 AD 670 at 671 it was said that ‘clear evidence’ is required to establish acquiescence in a breach.
- [21] This effectively amounts to 15 working days paid leave.
- [22] Section 20(11) of the BCEA.
- [23] Section 40(b) of the BCEA.
- [24] The five extra days leave for 6 years would be 30 days.
- [25] (2004) 25 ILJ 121 (LC). See also *Bronner v Alpha Pharm (Pty) Ltd and Another* (2020) 41 ILJ 1952 (LC) at para 13.
- [26] Id at paras 3.4 and 3.6.
- [27] Id at para 3.9
- [28] (2014) 35 ILJ 1322 (LC) at para 15.
- [29] Id at para 19.
- [30] (2003) 24 ILJ 1147 (LC) at para 14.
- [31] See *Bronner* (supra) at para 14.
- [32] [2014] ZALCD 64 (LC) at para 20. The Court considered the positions adopted in *Jooste and Jardine*, and specifically said that *Jooste* was the correct one.
- [33] (2010) 31 ILJ 675 (LC) at para 18.
- [34] The applicant commenced employment on 1 April 2013.
- [35] See *Minnie* (supra) at para 8 where it was held: ‘... Insofar as the applicants' claim is based on a contractual term and a breach of it, they accordingly bear the onus of proof to establish both the terms of the contract and the breach. ... The applicants' claim is that the respondent breached their contracts by failing to pay them for annual leave taken and accrued. It is incumbent on the applicants to establish that breach ...’.
- [36] An undertaking to pay this leave pay was provided in the respondent’s answering statement.
- [37] (2013) 34 ILJ 1804 (LC) at paras 46 – 47.

- [38] See *Pilanesberg Platinum Mines (Pty) Ltd v Ramabulana* (2019) 40 ILJ 2723 (LAC) at para 32; *Kwazulu-Natal Tourism Authority and Others v Wasa* (2016) 37 ILJ 2581 (LAC) at para 32.
- [39] See *Crookes Brothers Ltd v Regional Land Claims Commission, Mpumalanga and Others* 2013 (2) SA 259 (SCA) at para 15; *Land and Agricultural Development Bank of SA v Ryton Estates (Pty) Ltd and Others* 2013 (6) SA 319 (SCA) at para 14.
- [40] See *Scoin Trading (Pty) Ltd v Bernstein* NO 2011 (2) SA 118 (SCA) at para 11.
- [41] See *Mashaba and Another v Telkom SA SOC Ltd* (2020) 41 ILJ 2437 (LAC) at para 12.
- [42] Act 55 of 1975 (as amended).
- [43] Section 1(1) of the Interest Act provides: ‘If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate contemplated in subsection (2)(a) as at the time such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt,

orders

otherwise’.

- [44] The respondent has not applied nor has it sought to make out a case for the exercise of a discretion as contemplated by section 2A(5), for an alternative date from which interest shall run and at what rate it should be calculated. In *Adel Builders (Pty) Ltd v Thompson* 2000 (4) SA 1027 (SCA) at para 15, the Court said: ‘... The discretion afforded by section 2A(5) was of the nature referred to in a long line of cases in this Court from *Ex Parte Neethling* 1951 (4) SA 331 (A) onwards. Plainly, if parties wish certain facts and circumstances to be weighed in the exercise of such a discretion they must establish them See also *See King Sabata Dalindyebo Municipality v Landmark Mthatha (Pty) Ltd* 2013 JDR 1389 (SCA) at para 38; *Drake Flemmer & Orsmond Inc and Another v Gajjar* 2018 (3) SA 353 (SCA) at para 85
- [45] See *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) at para 28.

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