

SOUTH AFRICA / JUDGMENT

Misra v Ithala Limited (D1074/12)

[2014] ZALCD 64 (19 November 2014)

[2014] ZALCD 64**COURT**

Labour Court Durban

BEFORE

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CASE / FILE NUMBER

D1074/12

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REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D1074/12

In the matter between:

VIJAY MISRA.....Applicant

and

ITHALA LIMITED.....Respondent

Heard: 02 MY 2014; 16 September 2014

Delivered: 19 November 2014

Summary: Leave – accrual and forfeiture thereof – employee seeking payment of all accrued leave as at date of dismissal- case law considered and followed in interpreting and applying statutory law - forfeiture clause in an employment contract partially invalid.

CELE J

Introduction

- [1] The applicant seeks, in terms of section 77 (3) of the Basic Conditions of Employment Act[1], (“ the BCEA”), an order for the respondent to pay the monies due in respect of his outstanding leave pay of R250,158.33, and interest thereon at the rate of 15.5 % per annum and costs of the action. The respondent is seeking an order dismissing the action with costs.
- [2] The applicant was appointed in terms of a fixed term written contract of employment to the role of Chief Executive Officer for the respondent with effect from 1 December 2009. Previously, he worked for Ithala Development Finance Corporation (IDFC), the holding company for the respondent. He brought his accumulated leave along to the respondent and so in March 2010 he had 70.35 days leave credit. The contract of employment was to end on 6 December 2014.
- [3] His leave circle with the respondent commenced on 1 December 2009 to 30 November 2010 and that pattern continued every year thereafter. He performed his tasks for the respondent up until 7 April 2011 when he was placed on suspension by the respondent which was followed by the termination of his contract of employment on 16 May 2012 when he was dismissed by the respondent. In terms of the employment contract the applicant was entitled to 30 working days of annual leave every calendar year[2]. As at 31 March 2011, the applicant’s leave record reflected that he had leave due to him of 40.85 days. When his employment with the respondent came to an end he was paid out an amount equal to 45 days’ leave as part of his termination package.
- [4] The leave policy of the respondent formed part of its ‘General Conditions of Employment’ within its Human Resources Policy No B5. It provided that annual leave might only be accumulated to a total amount of 15 working days at any given time above the normal leave entitlement, being 30 days in the case of the applicant. Any excess leave not taken timeously would be forfeited[3]. Statutory leave might not be paid out at any stage other than on termination of employment for whatever reason. Payment for annual

leave was to be done in accordance with the provision of the BCEA. Leave granted in excess of the legally required minimum was to be paid out according to the pensionable income[4]. An employee who left Ithala’s employment having exceeded the leave entitlement was to have the monetary value of the excess in leave deducted from the final salary[5].

- [5] One practice that the respondent adopted to accommodate exigencies of its staff, long before the applicant joined its employment, was to allow them to sell some of their annual leave standing to their credit. While taking account of its overheads, the respondent

realised it could not continue to pay that additional amount in staff costs. So on 19 July 2004, it issued a letter to all staff notifying them that its executive council had decided to immediately stop the practice of selling annual leave. The letter stated that leave due on termination of employment would be paid out but limited to the maximum accumulated leave allowed.

- [6] The number of leave days that could be accumulated was limited to 15 days more than an employee's current annual leave entitlement. Those employees who had already accumulated leave in excess of the stated amount were to make arrangements with their managers to take their excess leave by the end of that financial year. A similar reminder was sent out to the staff on 29 November 2004 (which allowed staff to sell 10 days leave as a once off option until 31 March 2005) and on 28 November 2005. On 3 May 2010 the Executive Committee (Exco) of the respondent resolved in a meeting, inter alia, that:
- '8.4.8 Staff members with excess leave would no longer accumulate leave days above the threshold;
- 8.4.9 The Group Corporate Services Executive should provide a paper articulating exceptional cases to be recommended for approval;
- 8.4.10 There should be a consultation between Executive and staff, sensitising parties concerned that excess leave had to be reduced in the next six (6) months; otherwise same would be forfeited, prior to reflection of the change in salary advices'.
- [7] In terms of the Exco decision every Executive member, including the applicant, had to consult with his or her staff who had accumulated leave in excess of the maximum threshold with a view to submitting a report on those employees, who had been denied leave due to operational reasons so that they could be dealt with as exceptional cases to be recommended for approval by the Exco. In February 2011, the encashment of leave by staff was still in practice[6].
- [8] According to the applicant, he had an outstanding leave, not paid out by the respondent in the amount of 30.85 days at the termination of his contract, and that such full amount should have been paid out by the respondent which notwithstanding a demand for the payment of the sum of R250,158.33, being the amount in respect of the unpaid leave before tax, the respondent refused to pay it over to him. However, according to the respondent the applicant took 6 days' leave during the period 1 April 2011 to 16 May 2012. Further, the respondent averred that in terms of its leave policy, annual leave was only to be accumulated to a total amount of 15 working days at any given time above the normal leave entitlement. Any excess leave not taken timeously would be forfeited. It disputed that it owed the applicant any money for an outstanding leave pay.
- [9] The issue between the parties is essentially whether the applicant had outstanding leave, not paid by the respondent in the amount of 30.85 days at the termination of his contract, and whether such full amount should have been paid to the applicant.
- [10] The applicant submitted that in respect of the accrual of leave, ex lege, any provision of a contract of employment which provided for forfeiture of accrued annual leave, whether statutory or contractual,

given the impossibility of disentangling the two in any calculation, was unenforceable as being contrary to the provisions of the BCEA. He said that even if it could be argued that it was only statutory leave that could not be forfeited and not contractual leave over and above the statutory entitlement, clause 7.1.3 of the leave policy made no such distinction between contractual and statutory leave. He averred that Court could not be called upon or enjoined to redraft an unenforceable contractual provision for the respondent so as to make it partially enforceable thus committing “plastic surgery” on the clause.

- [11] He contended that the calculation and accrual had to begin on commencement of employment and not be calculated backwards from the date of termination of employment. Consequently, he accrued at least 15 days minima from the year 2010-2011, he accrued and carried forward other 15 days minima from the year 2011-2012, totalling 30 days minima. He said that he was entitled to claim that all days leave actually used were contractual leave and not statutory minima. He accrued a further 30 days entitlement between March 2012 and May 2012 when he was dismissed. He averred that he accordingly had 30 days which could never be forfeited and 30 days due from his last leave cycle. At a minimum then he would be entitled to the payment of 60 days and not only 45.
- [12] He said that, beside all of the foregoing, the respondent placed him on suspension in breach of his contract of employment for a period in excess of 30 days (clause 16 of his contract of employment) and instructed the applicant to remain available at all times, hence precluding any leave in the last leave cycle. The applicant remained on suspension in excess of 12 months. According to him the respondent precluded the applicant from taking any of his leave entitlement for the last leave cycle and could not, whilst repudiating the agreement, enforce its provisions regarding forfeiture. He opined that the rights and obligations effectively were suspended during the repudiation period and the respondent could thus not on the application of ordinary contractual principles rely on any forfeiture provisions relating to the last leave cycle.
- [13] He submitted that when considering paragraph 7.1.4 of the section dealing with vacation leave, with section 40 of the BCEA, leave granted in excess of the legally required minimum, the applicant’s additional accrued leave, calculated without the application of any unlawful forfeiture provisions, would be paid out according to the pensionable income. Accordingly, the applicant said, paragraph 7.1.4 of the policy conferred on him a right superior to the provisions of section 40 of the BCEA governing encashment and was binding on the respondent. He said that he was entitled to encashment of the full leave balance standing to his credit as at the date of termination of his employment. His contention was that paragraph 7.1.3 of the leave policy which provided for forfeiture of accrued leave was unlawful and unenforceable as being inferior to the rights conferred by section 20 of the BCEA. Paragraph 7.1.4 was applicable as granting a right to encashment superior to the right conferred by section 40 of the BCEA, entitling him to the payment of the full balance of his accumulated leave. He said that his claim for encashment was not founded on section 40 but on paragraph 7.1.4 of the policy read together with clause 20.1 of the applicant’s contract of

employment.

- [14] The respondent said that the applicant was contractually and legally bound by the provisions of the contract read with the Ithala leave policy in terms of which he was only permitted to accrue 15 days leave for which he was paid on his departure from the respondent on 16 May 2012. The respondent thus contended that the applicant had no further claim for additional accrued leave unless he could show that he was in some way or other not bound by the contract and/or that in law he was entitled to be paid all leave accrued to him during his period of employment by the respondent. The respondent said that the applicant was thus only left with the argument that in some way or other respondent's leave provisions in respect of accrued leave were unenforceable in law. Contractually the applicant had no argument open to him, said the submission. The applicant could thus only argue that in some way or other the respondent's accrued leave provisions were contrary to South African Statutory Law and in particular the BCEA i.e. he had some entrenched right to all accrued leave in terms of the BCEA.
- [15] In respect of the suspension, the submission was that the applicant did not plead that he was prevented from taking leave during the suspension and therefore no case was thus made out if the issue was pursued with. Furthermore, the letter of suspension made it clear that the respondent's policies and procedures continued to apply and thus it was open to the applicant to apply for leave which he did not do.

Evaluation

- [16] To the extent relevant here section 20 of the BCEA reads as follows:

'Annual leave

- (1) In this Chapter, "annual leave cycle" means the period of 12 months' employment with the same employer immediately following-
 - (a) an employee's commencement of employment; or
 - (b) the completion of that employee's prior leave cycle.
- (2) An employer must grant an employee at least—
 - (a) 21 consecutive days' annual leave on full remuneration in respect of each annual leave cycle; or
 - (b) by agreement, one day of annual leave on full remuneration for every 17 days on which the employee worked or was entitled to be paid;
 - (c) by agreement, one hour of annual leave on full remuneration for every 17 hours on which the employee worked or was entitled to be paid;
- (3) An employee is entitled to take leave accumulated in an annual leave cycle in terms of subsection (2) on consecutive days.

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

....

- (10) Annual leave must be taken—

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

- (11) An employer may not pay an employee instead of granting paid leave in terms of this section except –

- (a) on termination of employment; and
- (b) in accordance with section 40 (b) and (c).

[17] Section 40 of the BCEA is therefore also of relevance here as it regulates payments on termination of employment. As already alluded to in section 20, of importance are paragraphs (b) and (c) which then read:

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

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

[18] Sections 20 and 40 of the BCEA have been the subject of interpretation and application by this Court at least in three cases.

Both parties placed their reliance on these decisions in support of their submissions. These cases in point are:

- i. Jooste v Kohler Packaging Limited

[2003] 12 BLLR 1251 (LC);

- ii. Jardine v Tongaat-Hulett Sugar Limited

[2003] 7 BLLR 717 (LC) and

iii. Ludick v Rural Maintenance (Pty) Ltd

[2014] 2 BLLR 179 (LC).

[19] The applicant placed his reliance on the Jardine decision which held, per Pillay J, inter alia, that:

‘[13] The purpose of the BCEA is to advance economic development and social justice by fulfilling the primary object of the BCEA by, inter alia, establishing and enforcing basic conditions of employment and by regulating variations of such conditions. (See s 2 of the BCEA)

[14] Read in the context of this purpose, s 20(4) exists for the protection of employees who might otherwise be denied annual leave.

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 circle. Leave not taken within six months is not automatically forfeited.

[15] I agree with Ms Reddy that s 20 also does not preclude payment for leave not taken within six months.

.....

[22] Although the accumulation of leave at the instance of the employee is not prohibited by s 20 (4), s 40 (b) qualifies the employer’s

obligation to pay for any period of annual leave that has not been taken by, inter alia, limiting it to annual leave due in terms of s 20 (2), which in the case of the applicant would be 21 consecutive days. This obligation would therefore not apply to the five working days leave in excess of the statutory minimum. However, this is not the end of the matter. There are further considerations discussed hereunder.

[23] Assuming that there is no obligation to pay for the excess, it does not mean that as a matter of law the claim for the excess is forfeited. Although it cannot be enforced in terms of s 40 (b), it nevertheless remains a claim in favour of the applicant. It can be negotiated to his benefit.

[24] The respondent’s policy, however, provides expressly for the forfeiture of the excess leave, subject to the discretion of the Human Resources Director. In this respect, s 40 (b) is more favourable to the employees than the respondent’s policy.

- [25] The policy is further disadvantageous to employees as it pegs the accumulation of annual leave to 40 working days inclusive of current leave. Neither s 20 (4) nor s 40 (b) precludes an employee from accumulating leave or being paid for it. In the case of s 40 (b), the employee's position may be weakened by the unenforceability of the claim for the excess leave, but it is not forfeited, as in the case of the respondent's policy.
- [26] In my view, therefore, s 40 (b) prevails over the forfeiture provisions of clause C2.6'.
- [20] Accordingly, it was held in *Jardine* case that section 20 (4) was intended to protect an employee who otherwise could be denied leave, hence the requirement imposed on the employer to grant annual leave to the employee within six months post the end of a leave cycle. That notwithstanding, the employee was under no obligation to take leave within six months after the end of the annual leave cycle and leave not taken within six months was not automatically forfeited in terms of the employer's leave policy. In the *Ludick* decision, this Court, per van Niekerk J, found itself faced with two contradictory approaches in the interpretation and application of sections 20 (4) and 40 (b) of the BCEA[7]. A different interpretation had been adopted in the *Jooste* case where it was held that section 20 contemplated payments only (my emphasis) in respect of leave immediately preceding that during which the termination took place. In the *Ludick* decision this Court adopted the interpretation followed in the *Jooste* case by holding, inter alia, and in my view correctly that:
- '[18] The Act imposes an obligation on an employer to grant leave before the expiry of the six-month period. There is no right on the part of the employee to take leave at any time in that period. Section 20
- (10) is a clear indication that the BCEA envisages that the timing of leave, once accrued, ought ideally to be the subject of agreement between the parties. In the absence of agreement, the employer may determine the time at which leave should be taken (s 20 (10) (b)). There cannot, therefore, be any objection in principle to a provision in an employment contract that entitles the employer, ultimately, to dictate the timing of annual leave. But the timing of leave is one thing; the forfeiture of leave is quite another. The Act does not contemplate that an employee who does not take leave accrued in an immediately preceding leave cycle at an agreed or determined time during the six-month period following that cycle is necessarily denied that leave, or on termination of employment, its value.
- [19] In short: Section 20 of the BCEA contemplates that claims for the value of accrued leave are limited to statutory annual leave accrued in the current and immediately preceding leave cycles. An employee does not forfeit that leave or any claim to its value if for whatever reason, the leave is not taken in the six month period contemplated by s 20 (4).

- [20] A provision in a contract (such as clause 7.10 when applied in the present instance) would seem to me therefore to deny the plaintiff the benefit of a statutory basic condition of employment, which in terms of s 4 of the Act, must be read down into his employment contract’.
- [21] Indeed, section 20 (10) manifests a clear indication that the BCEA envisages that the timing of leave, once accrued, should ideally be the subject of agreement, between the parties. For that reason, it remains within the parties’ powers to attach a consequence that might flow from a failure of anyone of them to comply with the terms of the agreement. Such a consequence could very well be the forfeiture clause, only to the extent that it does not fall foul of the terms of the BCEA. The very fact that section 20 (4) provides that the employer must grant annual leave not later than six months after the end of the annual leave cycle means that a failure so to do may be visited by a consequence, such as enforcement measures. Similarly an employer should be entitled to curb an unlimited accrual of leave by an employee, who while having a right and an opportunity to take such leave, for whatever reason, shuns it.
- [22] The applicant said that the respondent placed him on suspension in breach of his contract of employment for a period in excess of 30 days and instructed the applicant to remain available at all times, hence precluding any leave in the last leave cycle. He never pleaded these facts. Even if he did, it was always open to him to apply for leave through the officer he was told he could contact while on suspension. He was specifically informed that the other terms and conditions of employment remained operative.
- [23] The dismissal of the applicant on 16 May 2012 fell within his third annual leave cycle which began on 1 December 2011. In terms of section 20 (4) the respondent had to grant the applicant annual leave not later than 6 months after the end of the annual leave cycle. The end of the second annual leave cycle was therefore on 1 June 2012. Until 1 June 2012, the applicant was accordingly entitled to take any of the 30 days leave accrued in the second annual leave cycle. The forfeiture clause took effect only from 2 June 2012. Therefore, the leave policy of the respondent offended the provisions of section 20
- (4) by providing that annual leave might only be accumulated to a total amount of 15 working days at any given time (my emphasis) above the normal leave entitlement. To comply with section 20 (4) the leave policy has therefore to be amended by substituting: “at any given time” with “six months after the end of the annual leave cycle.”
- [24] The above stated legal principles when applied to the facts of this matter appear to me to produce the following result. On 16 May 2012, the applicant had 30 days leave from the leave cycle of 1 December 2010 to 30 November 2011 plus 15 leave days surviving from the forfeiture clause operative on 2 June 2011 plus the proportional part of the current leave till 16 May 2012, being about 5.5 months out of twelve months, equalling about 13.75 leave days. The total comes to 58.75 leave days, if my calculation is anything to go by. He was paid out an amount equal to 45 days’ leave as part of his termination package. He took 6 leave days

leaving him with 7.75 leave days. He is therefore entitled to a further payment of 7.75 leave days, which is about R62 843.66. In the event of any of my calculations being markedly incorrect, the aggrieved party may, on notice to the other, apply to Court for the correction thereof.

[25] Each party sought a costs order, in the event of being successful, thus suggesting that costs should follow the results. The applicant has been awarded limited additional payment equal to almost a quarter of the amount he sought. It is fair and just to award neither party a costs order.

[26] The following order will consequently issue:

1. The respondent is ordered to pay the applicant leave pay for 7.75 leave days, equalling R63 843.66, with interest calculated at the current rate, however, from the date of this order.
2. No costs order is made.

Cele J.

Judge of the Labour Court of South Africa.

APPEARANCES:

For the applicant: Mr B MacGregor

Instructed by: MacGregor and Erasmus Attorneys

For the respondent: Mr B Mgaga

Instructed by: Garlicke and Bousfield Inc.

[1] Act Number 75 of 1997

[2] See clause 12.1. Further, Clause 12.3 provides that all other leave shall be in accordance with the Basic Conditions of Employment Act (BCEA) and in line with Ithala Leave Policy.

[3] See clause 7.1.3 of the Leave policy.

[4] See clause 7.1.4 of the Leave Policy.

[5] See clause 7.1.5 of the Leave Policy.

[6] See memorandum to all staff issued on 8 February 2011 by Mr S E Madondo, Acting Group Chief Executive Officer and an email dated 9 February 2011 issued by Mr Sagie Gounden of Human Resources.

[7] See para 13 of the judgment.

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