

SOUTH AFRICA / JUDGMENT

Oosthuysen v Big News For Small Business (Pty) Ltd (C 338/11)

[2013] ZALCCT 31 (10 July 2013)

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COURT

Labour Court Cape Town

BEFORE

Rabkin-Naicker

CASE / FILE NUMBER

C 338/11

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REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case No C338/11

In the matter between:

CHRISTOFF JACOBUS OOSTHUYSENApplicant

And

BIG NEWS FOR SMALL BUSINESS (PTY) LTDRespondent

Heard: 13/11/2012

Delivered: 10/7/2013

Summary: Claim for damages for breach of employment contract

RABKIN-NAICKER J

[1] Christoff Oostyusen (the applicant) was retrenched on January 27 2011 with effect from 26 February 2011. On termination, the respondent paid him inter alia:

1.1. Severance pay of R70 937.33 This was calculated at 2 weeks pay per year of service for 4.49 years (applicant was party to a 5 year contract at time of termination); and

1.2. Leave pay for 25 days in the amount of R39 457.34

[2] His claim before court was as follows:

2.1. Additional severance pay in an amount of 150 248.11 (calculated at 2 weeks per year for the full 14 years of service, as opposed to the 4.49 years taken into account by the respondent);

2.2. Additional leave pay in an amount of R37 496.30, or 24.5 days. He claims the total leave days due to him were 49.5, not 25;

2.3. Payment of 18 days worked in excess of the days of work stipulated in his contract, in an amount of 27 893,14; and

2.4. The cost of work facilities that he alleges were required to be provided by the respondent, but were not, in an amount of R61 610.00.

Evidence in court

[3] The applicant testified that he had begun to work for the respondent in July 1996 as Managing Director and did not have a written contract. In 2006 BDF publishers acquired shares in the respondent and all employees were required to sign new contracts. He had signed same on 7 September 2006. There had been no discussions regarding accrued leave pay. He stated that he did not know exactly what leave he had taken after 2006. He was instructed to take leave over Christmas in 2009. His leave days were recorded on his salary slips which form the basis of the calculation of his claim regarding accrued leave.

[4] Regarding extra days worked, he testified that when required he would work more than his normal 3 full working days a week and he could then take days off. After 2008, BDM had incorporated the respondent and he was no longer Managing Director and he then worked less. He was required to get his number of accumulated days worked down to zero which had not been possible but he made a commitment to reduce it below 20. He would submit a report in schedule form to the Human Resources officer to indicate the status of extra days worked. There was no request for clarification of these schedules. The schedules form the basis of this part of his claim.

[5] Regarding the claim for his provision of facilities, applicant testified that from the end of 2008, all staff had relocated from the then premises but he had stayed behind. There was one telephone line, internet and email lines were suspended and at some point also the telephone. Sometimes there was no parking available. From January 2009, until the retrenchment in February 2011 he had incurred expenses for necessary equipment and rent for office space from January 2010 as the lease had expired. Human Resources had confirmed with him that the lease was coming to an end. He had written to ask where he should work and had mentioned that he may be able to work from home. Working from home had not been practical, so he had no option but to rent office space.

- [6] Under cross-examination he agreed that when he entered into the 2006 contract with BDM, it was concluded after negotiations. He had proposed changes and BDM were not averse to making some. He had a lawyer to look over the contracts governing the sale of shares and employment and signed them after taking legal advice.
- [7] He agreed that by the end of 2008 when the rest of the staff were asked to move to other offices, the respondent was not doing very well and was losing money.
- [8] It was put to him that on a proper reading of his contract and in particular clause four thereof, he was not required to work more than the equivalent of three days in a week given that Clause 4.1 of the contract provided that: "The Employee shall be required to work twenty four (24) hours (being the equivalent of three full working days) per week for the Company on average, and to do such work within these hours as is necessary for the efficient performance of his duties, and the Employee hereby agrees to do so. It is explicitly noted that the Employee shall be required to participate in activities that require overnight trips."
- [9] Applicant disagreed saying that on his reading of clause 4 of the contract he would have to work more than three days in some weeks. He agreed he had signed off on the contract which states in clause 3.2 thereof that :

"This contract of employment shall be binding on the parties from the Commencement Date and neither party shall have any claim against the other party, for any reason whatsoever; prior to the Commencement Date."

- [10] It was also put to him that Clause 19.7 of the contract which he had signed provides that: "This agreement is in substitution for all previous contracts of service or other arrangements relating to his employment between the employee and the Company or its predecessor, which shall be deemed to have been terminated by mutual consent as from date of signature hereof." He conceded that he did not discuss continuation of service for the purposes of severance pay with the respondent. He agreed that he had made his claim for severance pay notwithstanding that he was not employed full-time in terms of clause 4.1 of the contract. Applicant stated that he could not recall how many days leave he took so he trusted the company records and agreed with the salary slips. The 25 days accrued leave that he had been paid for on retrenchment was a random figure in his view.
- [11] It was put to applicant that he did not have the consent of the respondent to rent office space. He said he did not have the courtesy of a reply to his request. In this respect the company gave him no direction so he had to make a plan. Regarding the costs of equipment he was claiming for he agreed he could not apportion these between the work he did for the respondent and for his own companies. The various other directorships and shareholdings he had are recorded in Annexure 'A' to the employment contract.
- [12] The respondent did not call any witnesses.

Evaluation severance pay

[13] It was common cause that a policy called the Avusa “Relationship Building Policy” was incorporated by reference into the contract of employment and was applicable to the retrenchment and governed severance pay. The relevant portion of the policy provided that:

“3.3.8...employees who are retrenched will be entitled to the following:

.....

(b) Two weeks’ pay for every one year of complete unbroken service with the Company and on a pro-rate basis for any incomplete one-year period.”

[14] It was submitted on behalf of applicant that the new fixed term contract could not alter the historical fact of the actual commencement date of his employment with the company or that there had been no break in services rendered to the company between 1996 and 2006.

[15] On behalf of the respondent company, it was argued that the fixed term contract and in particular clause 3.2 and 19.7 thereof means that the period of employment is to be determined by reference to the date of commencement of the contract in September 2006. Clause 3.2 extinguishes by agreement any claims that applicant may have against the respondent for the period before 1 September

2006. Clause 19.7 expressly provides that all other previous employment contracts and arrangements have been terminated by mutual consent. This was evident on the plain meaning of the contract. If external circumstances were needed to interpret same then on applicant’s own evidence the parties consciously included the provisions. It was thus submitted that there cannot be any other conceivable explanation for the inclusion of these two clauses other than to limit his period of service in the manner contended for by the respondent. The effect of these clauses was to effect a break in service with the company.

[16] The respondent further argued that no reliance could be placed on the provisions of the Basic Conditions of Employment Act by applicant as he had not pleaded same. In the result his case must be considered exclusively on a contractual basis – the effect of these contractual provisions being to vary and exclude the provisions of section 84(1) of the BCEA.1

Leave Pay

[17] In respect of the leave pay claimed, it was submitted on behalf of the respondent that applicant was unable to lead any evidence to prove that he was not paid all his leave pay. The respondent had advised him that the 49.5 days leave reflected in his salary slips had been incorrectly calculated and the balance reflected on the pay slips was actually all leave accrued on a monthly basis. Whether the advice was correct or not, applicant bears the onus of proof to establish the claim. His clear evidence before court was that he did not in fact know how many days he had taken. He relied on the pay slips and records of the company.

- [18] In the alternative the respondent argued that the number of leave days due should be calculated using the following formula: He worked for 1.7 years over the period 1 September 2006 to 27 February 2011. His leave entitlement was thus 22 days for the whole period (15 days for the first year and 7 days for the seven months). Having been paid for 25 days, he is accordingly not entitled to any further payment.

Facilities

- [19] According to the respondent the contract between the parties did not provide that if the respondent failed to provide these facilities, applicant was entitled to acquire them and claim the cost. This was because he was in part-time employment with permission to conduct his other businesses. In any event it was argued that no evidence was adduced to prove what the amount was. Three invoices were submitted covering the period March 2010, May 2010 and December 2010. He specifically relied on the provision of data services at a rate of R253.51 per month, exclusive of VAT. Applicant testified that he should be paid this amount regardless of how much data he used if any. He conceded he could not say that he actually used any portion of the data for respondent's business and if so which portion.
- [20] On behalf of applicant, Mr. Leslie submitted that faced with the breaches of the respondent including the withholding of the facilities the applicant was perfectly within his rights to hold the respondent to the contract and to take whatever steps were necessary to continue to provide his services. The damages claimed were reasonable.
- [21] As to the premises in which applicant worked, Mr Maserumule for the company submitted that Clause 5.3 of the contract provided that he may not be required to relocate from Cape Town. He argued that it did not direct that he do his work from the Claremont premises. Applicant did not inform the respondent he would do so, or acquire authority to. He did not in any event lead evidence sufficient to prove damages of R54 460 00 which he is claiming. He submitted four invoices amounting to R16 159.38. He

was unable to aver what portion of the rental and related expenses related to the business of the respondent and which related to his own businesses.

Evaluation

- [22] The legal issues sought to be determined by this court as identified in the amended statement of claim before me are drafted as follows:

“Whether the applicant is entitled to be paid the balance of the severance pay and other monies that he allege are due and owing to him by the respondent in terms of his contract of employment.....”

- [23] The applicant has explicitly relied on section 77(3) of the BCEA and in terms of an agreement with the respondent eschewed the jurisdiction of the CCMA regarding claims under the BCEA. Section 77(3) provides as follows: '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.' In terms of the pleadings before me this court has assumed jurisdiction in terms of section 77(3) of the BCEA.

[24] The Labour Appeal Court has recently considered the section in respect of a counter-claim that was pleaded by an employer before

it.2 Waglay AJP (as he then was) held as follows:

“[39] I am satisfied that s 77(3) read with s 77A(e) favours an interpretation bringing within its ambit the type of claim instituted by the appellant in this matter as:

39.1 The word 'concurrent' in s 77(3) places the Labour Court in exactly the same position as the High Court with the same powers and authority in relation to matters concerning a contract of employment.

39.2 The last part of s 77(3) provides the Labour Court with jurisdiction irrespective of whether any basic condition of employment constitutes a term of the employment contract. This demonstrates that the Labour Court has jurisdiction over any claim as long as it involves a contract of employment

39.3 The words 'concerning a contract of employment' mean about or in connection with an employment contract. The pleaded claim clearly falls within this categorization.

39.4 The words 'any matter' in s 77(3) are broad and the literal interpretation does not limit the claims, in relation to a contract of employment, to a specific category. Damages, both liquid and illiquid, are included.”

[25] I must now consider whether the contract was breached and if so whether applicant has proved his damages.

25.1. In so far as past service (i.e. before the conclusion of the contract of employment) is concerned in respect of severance pay owed, I must agree with the respondent that the clear wording of clauses 3.2 and 19.7 preclude such a claim.

25.2. As regards the claim for accrued leave, clause 4.1 of the employment contract cannot be read as meaning that the applicant worked full-time or that he was obliged to work more than 24 hours a week. He had to work 24 hours per week on average. The plain meaning being that he might work more than 24 hours in some weeks, or less than 24 hours in consecutive weeks, but he had to average 24 hours a week. On this basis his accrued leave would be 22 days (15 days for the first year and seven days for the seven months). Having been paid for 25 days there was no breach of his contract. In addition his claim for days worked in excess of the stipulated 24 hours a week in the contract of employment cannot be sustained.

25.3 In respect of the facilities he paid for, applicant was unable to prove his damages on his own evidence. In *Aarons’s Whalerock Trust v Murray & Roberts Ltd & Another*³ the court summarized the law in respect of the proof of damages in a contractual claim as follows:

“Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the Court to quantify his damages and to make an appropriate award in his favour. The Court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the Court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss.”

Even if the contract was breached by a failure to provide an office and facilities to applicant, he elected to claim damages and did not have the requisite evidence to place before court to prove same. It would truly be guesswork for this court to estimate these.

[26] In all the circumstances, applicant’s claim must fail. Given that applicant is an individual, and in view of the jurisprudence of this court with respect to costs orders, I am not going to make a costs order in this matter. I therefore make the following order:

Order:

Applicant’s claim is dismissed.

Rabkin- Naicker J

Judge of the Labour Court

APPEARANCES

For the Applicant: Asv. G . Leslie instructed by Chennels Albertyn

For the Respondent: Mr. P. Maserumule of Maserumule Inc

1Section 84 (1) provides:” For the purposes of determining the length of an employee’s employment with an employer for any provision of this Act, previous employment with the same employer must be taken into account if the break between periods of employment is less than one year.”

2Rand Water v Stoop & another (2013) 34 ILJ 576 (LAC)

3 1992

(1) SA 652 (C)

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