



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Case no: C 171/2015

In the matter between:

Martha Petronella BESTER

Applicant

and

SELFMED MEDICAL SCHEME

Respondent

Heard: 11-13 September 2017; 18-20 June 2018

Delivered: 31 July 2018

Summary: Contractual claim for outstanding leave pay. BCEA s 77.

JUDGMENT

STEENKAMP J

Introduction

- [1] The applicant, Mrs Marthie Bester, claims that she is contractually entitled to 218 days' (alternatively 213.5) accrued leave pay. Her former employer, Selfmed, says that she was only entitled to 45 days' leave pay when she resigned; and that it had paid her that amount.

Background facts

- [2] Mrs Bester was initially permanently employed as the national marketing director of Selfmed. That was converted to a fixed term contract expiring on 31 December 2014. Her husband, Mr Leon Bester, was the CEO. When her fixed term contract was terminated in December 2014, her payslip recorded that Selfmed owed her 218.74 days' accrued leave. Selfmed disputes that. It says that she was entitled to 45 days' outstanding leave and that it was paid to her.
- [3] The standard terms and conditions of employment at Selfmed contained the following relevant clauses dealing with annual leave:
- “5.4 On termination of employment, an employee shall be paid out the value of annual leave and but not taken, on a pro-rated basis.
- ...
- 5.6 Leave becomes due to an employee once the employee has completed one and every consequent annual leave cycle; i.e. the period of 12 months' employment immediately following the employee's commencement of employment. Such leave must be taken not later than the six months after the end of the annual leave cycle, failing which any accrued leave shall be forfeited.”
- [4] It is common cause that the Selfmed Board of Trustees adopted the following resolution as “Addendum 2 to the leave policy” on 27 September 2005:
- “In any year, an employee may only accumulate 50% of their annual leave entitlement. For example – if allowed 20 days leave per annum, then a maximum of 10 days may be transferred to the next year. At the end of year three, the accumulated balance may therefore not exceed 30 days. The only exception being that an 18 month window is allowed to take a year's leave entitlement. Leave may be sold in lieu of cash provided a minimum balance of 10 days is left. Only days accumulated during previous years may be sold. Any leave sold must be approved by the CEO.”
- [5] That addendum was never rescinded by the Board of Trustees.
- [6] In April 2013, and without notice to the applicant, Selfmed and two other parties (the Registrar of Medical Schemes and the Council for Medical

Schemes) entered into an agreement that was made an order of court, by agreement between those parties, before Blignaut J in the Western Cape High Court. Mrs Bester was not a party to the court proceedings or the agreed order. Part of the agreed order read:

“4. The Board of Trustees of the respondent in case number 3135/2013 (“Selfmed”) shall forthwith give notice in writing to Mr Leon du Toit Bester (“Mr Bester”) and to Mrs Martha Petronella Francina Bester (“Mrs Bester”):

4.1 requiring them to absent themselves from Selfmed’s premises with immediate effect pending the outcome of the enquiry envisaged by paragraph 10.3 below to be initiated by the Acting Principal Officer within 14 days of date hereof; and

4.2 stipulating that, pending the outcome of such enquiry they shall not involve themselves in any way in the running or affairs of Selfmed including the general meeting of Selfmed or the election of the members of the new Board of Trustees referred to herein or any other general meetings or elections of such members.

5. Selfmed shall pay Mr Bester and Mrs Bester the basic salaries pending the outcome of such enquiry.

6. Selfmed shall not disburse to Mr Bester and Mrs Bester any further amounts on account of their employment with Selfmed (other than their basic salaries as aforesaid) or its termination pursuant to the enquiry contemplated by paragraph 4 above and 10.3 below, including but not limited to the following:

6.1 any amount in respect of the balance of the terms of their respective contract of employment with Selfmed;

6.2 any amount in lieu of leave in respect of any leave not taken; and

6.3 any bonuses, long service awards or any other discretionary payments, it being recorded that the contents of this paragraph do not preclude Mr and Mrs Bester from claiming from Selfmed payment of any further amounts to which they believe they are entitled.”

[7] The agreed order provided for the acting principal officer to:

“forthwith initiate and thereafter conduct, or cause to be conducted, an appropriate and fair enquiry aimed at decisions by Selfmed as to whether the employment of Mr and/or Mrs Bester should be suspended and/or

terminated or any disciplinary sanctions should be imposed on Mr and/or Mrs Bester.”

[8] No disciplinary enquiry was conducted. Selfmed withdrew any allegations of misconduct against Mrs Bester on 21 February 2014.

[9] It is not clear what the words “pursuant to the enquiry” in clause 6 of the Western Cape High Court order mean. Presumably that clause was only meant to relate to the possible termination of the Besters’ employment. Selfmed took the view that it was not obliged to pay Mrs Bester interest on the emoluments that had been withheld in terms of the agreed court order, retrospectively to the date she was barred from its premises. It only repaid her the capital sum that had been withheld and interest from 21 February 2014 (when it withdrew the charges against her) to June 2014 (when it paid her those amounts).

[10] Mrs Bester’s employment terminated at the end of December 2014. Her payslip for that month reflected 218.74 “leave days due”. But Selfmed only paid her out the equivalent of 45 days’ leave pay.

[11] She queried the non-payment of the balance of the accrued leave as reflected on her payslip with the principal officer, Mr Christo Becker, on 12 February 2015. He simply stated in response:

“The leave has been calculated at 45 days and the leave amounts to R 281 422, 08.”

[12] The applicant then asked Becker:

“Please disclose the details, reasons and justification for not paying me my contractual leave entitlement amount as per the Selfmed records and systems. Selfmed is quite aware what the exact amount of my accrued leave days amounts to. Also provide me with how you have arrived at the arbitrary amount of 45 days. In the meantime, I must demand all outstanding leave to be paid immediately in compliance with my entitlements and contractual obligations Selfmed has towards me.”

[13] Becker responded more than a week later, simply stating:

“Your leave has been calculated and paid out as the maximum leave that may be accrued in a leave cycle as per the policy of Selfmed.”

[14] The applicant replied on the same day. She asked Becker to email her quote the Selfmed leave policy detailing the quantifications and qualifications that you have used and that you are referring to in your email below immediately.” He did not respond. She wrote him again four days later, on 10 March 2015:

“With reference to my emails below, there has been no response to a very simple request. To email me copies of the alleged leave policy can best take two minutes maximum and it is urgently awaited. This is my final demand to disclose and provide me with the Selfmed leave policy as referred to by you being the reason why Selfmed is not paying me my contractual leave entitlement.”

[15] Becker never responded.

[16] The applicant then, initially and mistakenly, referred an unfair labour practice dispute relating to benefits to the CCMA. On 27 March 2014 the CCMA ruled that it did not have jurisdiction. She then referred a dispute in terms of section 77 of the Basic Conditions of Employment Act¹ to this Court.

The claims

[17] Mrs Bester relies on two claims, styled as claim A (including an alternative claim introduced by way of an amendment) and claim C.

Claim A: Accrued leave

[18] The applicant initially claimed payment for 218.74 days’ accrued leave as reflected on her December 2014 payslip. At the first sitting of this trial in September 2017 she amended her statement of claim to incorporate an alternative claim for 213.5 leave days, calculated in terms of the Selfmed policy reflected in Addendum 2 to the leave policy (i.e. the amended policy adopted by the Board of Trustees in September 2005).

[19] In his oral argument at the end of the trial in June 2018 Mr Crowe SC, for the applicant, confined her claim to that pleaded in the alternative, i.e. in

¹ Act 75 of 1997.

respect of 213.5 leave days. That amounts to R 1 470 562, 38, comprising a capital sum together with interest.

Claim C: Interest on emoluments

[20] The applicant's initial claims B and D have been abandoned. Claim C relates to interest on the unpaid emoluments for the periods when the payments became due each month until they were paid in June 2014. That amounts to R20 619, 74, together with further interest on that amount from 27 June 2014 until date of payment.

The evidence

[21] Only Mrs Bester and Mr Becker (on behalf of Selfmed) testified.

[22] Although the applicant had some difficulty in situating her claim for accrued leave in either her initial claim (that was simply based on the amount reflected on her December 2014 payslip) or the alternative calculation based on the policy contained in Addendum 2, she remained steadfast that that policy had not been changed since it was adopted in September 2005. And her oral evidence confirmed the calculations set out in the amended pleadings, based on that policy. She explained that she and her legal team had calculated the amount owing to her based on the accrual of 50% of her leave entitlement per year. Those calculations were set out in detail in a document that her counsel handed up to the Court.

[23] Mr Becker, on the other hand, had difficulty explaining why he based his calculations on the applicant only being entitled to 45 days' accrued leave. When he first did the calculation, he was not even aware of the amended leave policy adopted in September 2005. He only became aware of that policy in preparation for the first sitting of this trial, prior to September 2017; and then he did nothing more to ascertain what it actually meant. The copy he was initially given, read as follows:

““In any year, an employee may only accumulate 50 [sic] of their annual leave entitlement. For example – if allowed 20 days leave per annum, then a maximum of 10 days may be transferred to the next year. At the end of year three, the accumulated balance may therefore not exceed 30 days. The only exception being that an 18 month window is allowed to take a

year's leave entitlement. Leave may be sold in lieu of cash provided a minimum balance of 10 days is left. Only days accumulated during previous years may be sold. Any leave sold must be approved by the CEO."

- [24] Becker did not enquire further into the obvious omission after the numeral "50" in the first sentence. He interpreted it as "50 days", despite the obvious discrepancy when that is read in the context of the rest of the clause (e.g. 10 out of 20 days that may be transferred, is clearly 50%).
- [25] Despite the document being clearly marked "**ADDENDUM 2 TO LEAVE POLICY AS PER THE MINUTES OF THE BOARD OF TRUSTEES MEETING 27 SEPTEMBER 2005**", Becker did not attempt to access those minutes. The minutes, that were before Court, clearly reflect "50%". The amendment was adopted and the minutes were again adopted at the next meeting of the Board of Trustees. The applicant was present at both meetings. Becker was not. He only joined Selfmed at a later stage.
- [26] The best that Becker could do was to testify that he had been informed by people in the Finance Department that the amended leave policy had never been implemented. No witnesses who had direct knowledge of that allegation were called; nor did Selfmed produce any documentary evidence to that effect.

Evaluation / Analysis

- [27] In order to evaluate the applicant's claims, I shall confine myself to her alternative to claim A (as Mr Crowe did in his oral argument) and then deal with claim C.

Claim A: Accrued leave pay

- [28] Mr Ellis summed up the crux of the dispute with regard to Claim A: What was the Selfmed leave policy at the time of Mrs Bester's departure?
- [29] On a balance of probabilities, the answer to that question is a simple one. Mrs Bester was a more credible witness than Mr Becker. She had direct knowledge of and was present at the Board of Trustees meeting where the amended leave accrual policy was adopted. She presented the Court with minutes of that meeting and of the subsequent meetings where that minute

was adopted. The amended policy was also included in the Nexus report that led to her temporary removal from Selfmed's premises. It was never rescinded. Becker, on the other hand, could only testify to a vague allegation by other employees in the Finance Department – who were never called – that the policy was not implemented as it stood. That does not nullify the fact that the policy existed and that both parties were bound by it. Mrs Bester certainly never waived her right to be bound by it.

[30] The technique to resolve disputes of fact is well known:²

“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. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less

² *Stellenbosch Farmers Winery v Martell et cie* 2003 (1) SA 11 (A) par 5 [per Nienaber JA].

convincing will be the latter. But when all factors are equipoised probabilities prevail.”

- [31] Not only was Mrs Bester a more credible witness, the reliability of her evidence is backed up by the documentary evidence. Quite simply, it is beyond doubt that the amended leave policy was adopted by the Board of trustees in September 2005 and that both parties were bound by it. On the other hand, there is no credible evidence that the policy was ever rescinded or that Bester and Selfmed no longer considered themselves bound by it. And Bester’s evidence that the Selfmed staff attended a celebration at a restaurant to celebrate the “excellent news that the staff can now accumulate 50% of their leave” could not be gainsaid by Becker. The same goes for her evidence that, in her position as marketing and operations director, she personally told staff members that they could “sell” their accumulated leave once it was approved by the CEO.
- [32] The probabilities are overwhelmingly in the applicant’s favour. She has, on a balance of probabilities, discharged the onus to show that the amended leave policy applied to her. And applying that policy, she has shown – through the meticulous calculations handed up by her legal team – that she is entitled to the amount set out in her alternative to claim A. That amount is calculated on the basis of her monthly remuneration as at December 2014, which was R149 260, 29.

Claim C: Interest on emoluments

- [33] The claim for unpaid interest on emoluments arises from the order that Blignaut J granted by agreement between Selfmed and two other parties – with no input by Mrs Bester, who was not cited as a party – on 16 April 2013. Of course the parties to that agreement were bound by it, even though Bester was not a party. But does that mean, as Selfmed contends, that it was not obliged to repay Mrs Bester the interest on the emoluments that she sacrificed while she was barred from Selfmed’s premises?
- [34] To recap: in terms of the High Court order, Mrs Bester had to leave Selfmed’s premises and she was only paid her basic salary pending an inquiry; and Selfmed would not “disburse to Mr Bester and Mrs Bester any

further amounts on account of their employment with Selfmed (other than their basic salaries as aforesaid) or its termination pursuant to the enquiry”.

- [35] On 21 February 2014 Selfmed withdrew all charges of misconduct against Mrs Bester and reinstated her. That should have restored the *status quo*; but Selfmed argues that it is only obliged to pay her interest on the emoluments that were unpaid during her *de facto* suspension from 21 February 2014 to the actual date of payment. That, argued Mr *Ellis*, was the date on which the payments became due and owing.
- [36] That argument cannot hold water. When Mrs Bester was reinstated, the *status quo* was restored. The emoluments became due and owing each month that they were withheld. Interest thus runs from each of those dates. That is the date on which Selfmed was *in mora* each month in terms of the common law.
- [37] It is common cause that, on 27 June 2014, Selfmed paid Bester an amount of R362 602, 34 being the capital sum owing to her for the unpaid emoluments. It also paid interest from 21 February to 27 June 2014, amounting to R 19 532, 77. That leaves a balance of R20 619, 76 unpaid in respect of the claim for interest which Selfmed has not paid, despite demand. It must therefore pay the applicant that sum together with further interest thereon until date of payment.

Conclusion

- [38] The applicant is successful in both claims. In respect of claim A, her unpaid accrued leave based on 213.5 days' accrued leave amounts to R 1 470 562, 38. Selfmed has paid her R 281 422, 08, leaving an unpaid balance of R 1 189 140, 30. It must also pay her interest on the outstanding amounts.
- [39] In respect of claim C, Selfmed must pay Bester the outstanding amount set out above in paragraph [37] together with interest.
- [40] With regard to costs, I take into account that both parties asked for costs to follow the result; and that Mrs Bester, an individual, had to resort to lengthy and costly court action to recover what was lawfully hers.

Order

[41] I therefore make the following order:

41.1 The respondent is ordered to pay the applicant the following amounts in respect of claim A:

41.1.1 An amount of **R 1 189 140, 30** in respect of unpaid accrued leave;

41.1.2 Capitalised interest that accrued at the then prevailing rate of 9% per year on the sum of R 1 470 562, 38 during the period 25 December 2014 to 17 February 2015, amounting to **R 19 218, 03**;

41.1.3 Interest on the total amount of R 1 208 358, 33 from 17 February 2015 to date of payment at the prevailing prescribed rate of interest.

41.2 The respondent is ordered to pay the applicant the following amounts in respect of claim C:

41.2.1 **R 20 619, 76** in respect of capitalised interest, together with interest thereon from 28 June 2014 until date of payment at the prescribed rate of interest of 15,5% per year..

41.3 The respondent is ordered to pay the applicant's costs.

Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Michael Crowe SC
Instructed by Bagraims (B Schiff).

RESPONDENT: Edwin Ellis of Edward Nathan Sonnenbergs.

LABOUR COURT