IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case no: D 1512-16

Not Reportable

In the matter between:

JEFFREY STEPHEN BRONNER	**Applicant**
and	
ALPHA PHARM (PTY) LTD	**First Respondent**
ALPHA PHARM (KZN) (PTY) LTD	**Second Respondent**

Heard: **15 August 2019**

Final Closing Argument delivered: 27 August 2019

Judgment delivered: **28 January 2020**

JUDGMENT

WHITCHER J

Introduction

[1] The applicant has brought 8 different claims against the respondents. The parties settled claims 1, 3 and 6. Accordingly, claims 2, 4, 5, 7 and 8 remain.

[2] At the commencement of the trial, the court asked applicant's counsel to explain the statutory basis of the claims and the court's jurisdiction, considering this was not pleaded. According to applicant's counsel, "this is an action brought in terms of section 77(3) of the Basic Conditions of Employment Act, 1997 which states that 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 conditions of employment constitutes the term of the contract.

Background

[3] The applicant was employed in terms of a letter of employment issued by Natal Wholesale Chemicals (Holdings) Ltd trading as Alpha Pharm on 20 January 1995. In terms thereof:

3.1 He commenced employment on 1 April 1995 as the chief financial officer;

3.2 He was entitled to four weeks leave a year.

3.3 He was additionally entitled to an extra four weeks leave upon the completion of every 5 years' service.

3.4 Leave could not be accumulated other than according to laid-down company policy.

[4] On 28 November 2012, the applicant's employment was extended for a further three years ending on 30 November 2015. When the applicant left the employ of the second respondent on 30 November 2015, three years after he reached retirement age, he was the chief executive officer.

[5] Counsel for the respondents has aptly summed up why the applicant's claims are fatally flawed. His observations coincide with what I noted in the pleadings and the evidence presented.

Claim 2

[6] The applicant claims for the difference between a "surrender value" and a "paid up value" of a policy. This claim is dismissed for the following reasons:

6.1 The applicant's pleaded claim is in the form of a claim for damages, but it is not pleaded in terms of section 77, which placed the respondent in

a bind. The respondent submitted that had the claim arisen from a term of an employment contract then its submissions would have been different, but it is not.

6.2 The applicant failed to prove what the surrender value would have been and relies on a valuation from 1996 which at best could be described as an estimate. Therefore even were the claim to be valid, the applicant has not proven what his damages are.

6.3 In fact there is no claim. The applicant signed a director's resolution on 20 May 2016 in which he authorised one Charles Delomoney to sign all documents relating to the surrender of the deferred compensation policy. In his evidence the applicant stated that he intended this to be a cession. I agree with the respondents that the principle of *caveat subscriptur* would apply.

6.4 As a chief financial officer and chief executive officer the applicant admitted that he knew the differences between the two and admitted that he did not express his understanding to the signatories of the resolution.

6.5 The applicant said he wanted to make payments to Old Mutual but produced no evidence that he tried to do so and no proper explanation therefor.

6.6 In the circumstances, the ordinary meaning must be applied to the resolution, and, as the applicant is only entitled to the surrender value, which amount was tendered in May 2018, his claim must fail.

Claim 4

[7] The applicant claims that an agreement was reached to pay him the equivalent of a daily wage for four additional days of work which he agreed to.

[8] This claim is rejected for the following reasons:

8.1 In his evidence the applicant referred to two separate separation and settlement agreements, signed by the second respondent *but rejected by himself*. Thus, there was no meeting of the minds and no agreement had been reached on the *quantum*.

8.1 The clear reading of both contracts is that the second respondent intended to pay the applicant only a total of R16 000.00, which payment he accepted and did not return.

Claim 5

[9] On the termination of his employment on 30 November, the Applicant was paid [or offered] 11/12 of his full annual bonus. I am unable to make out from the evidence whether he was paid or offered the amount. It does not matter as the case does not turn on this aspect.

[10] The applicant pleaded that it *"was the second respondent's practice that any employee that retired at the end of November would be entitled to a full annual bonus being the equivalent of one month's salary*".[1] The applicant pleaded his entitlement within this practice, but offered no evidence of the practice in evidence in chief. When this was pointed out in cross-examination, he testified that a comparator was one Louis Atkinson who had resigned. As such the claim must be dismissed.

Claim 7 and 8

[11] In essence, the applicant seeks payment of leave he says accrued as at date of the termination of his employment, and at a certain rate of pay. He pleaded that he had accumulated 80 days extra leave and an additional 98 days annual leave. He claims payment thereof at a certain rate of pay. In addition, he claims payment for leave due in his last leave cycle, at a certain rate. In respect of the latter, he pleads that he should have been paid for 19.5 days, at a certain rate, whereas he was only paid for 18.5 days and at an incorrect rate of pay.

[12] The respondent denies that the applicant had outstanding leave not paid by the respondent at the termination of his contract.

[13] I shall start with the issue of accumulated leave. In terms of the respondents' Employee's Handbook and specifically clause 5, annual leave must be taken

[1] My emphasis.

within 6 months of the anniversary of appointment and the accumulation of leave is not permitted. The applicant denies knowledge of this Handbook and it was revised in Oct 2013. Considering case law on the subject of accrued leave, this dispute does not matter. In *Misra v Ithala Limited* (D 1074/12) [2014] ZALCD 64 Cele, J wrote as follows:

[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:

Jardine v Tongaat-Hulett Sugar Limited [2003] 7 BLLR 717 (LC) and

Jooste v Kohler Packaging Limited [2003] 12 BLLR 1251 (LC);

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)
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> [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.
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> [15] I agree with Ms Reddy that s 20 also does not preclude payment for leave not taken within six months.
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> .....
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> [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[2]. 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

[2] See para 13 of the judgment.

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.

[14] It follows that the decision in *Jardine v Tongaat-Hulett Sugar Limited* [2003] 7 BLLR 717 (LC) has consistently not been followed, and the law as it now stands is that section 20 of the BCEA contemplated payments *only* in respect of leave immediately preceding that during which the termination took place.

[15] The above stated legal principle when applied to the facts of this matter appear to me to produce the following result: all that the applicant can claim is the leave which accumulated from 1 April 2015 to 30 November 2015, and, on

the basis of his monthly remuneration as reflected in his salary slips, he was paid more than what was owed for the period 1 April 2015 to 30 November 2015. Claim 7 and claim 8 must therefore fail.

Costs

[16] I see no reason why the usual rule that costs follow the result should not apply in this claim, which is not one which is founded in an alleged unfair dismissal or discrimination but monetary claim. The applicant contended that this action was brought in terms of section 77(3) of the BCEA. The Labour Appeal Court held that in matters treated as civil claims the regime for costs is that, absent special considerations, costs ought to follow the result.

Order

The applicant's claims are dismissed with costs.

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Benita Whitcher

Judge

APPEARANCES:

For the Applicant: MMH Titus, from Macgregor Erasmus Attorneys

For the Respondents: M.A. Lennox, instructed by David W Morgan Inc