

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

REPORTABLE

CASE NO **D849/02**

Date heard: 2003/04/17

Date delivered: 2003/04/23

In the matter between:

STEVEN CHRISTOPHER JARDINE

APPLICANT

and

TONGAAT-HULETT SUGAR LIMITED

RESPONDENT

**JUDGMENT DELIVERED BY THE HONOURABLE MS JUSTICE PILLAY
ON 23 APRIL 2003**

FOR THE APPLICANT :

SHANTA REDDY

SHANTA REDDY ATTORNEYS

FOR THE RESPONDENT:

IRVIN LAWRENCE
GARLICKE AND BOUSFIELD

PILLAY J

- [1] The applicant's claim is for payment of 8,8 days annual leave pay amounting to R8 327,13. The respondent has tendered to settle his claims for other outstanding leave and certain incentives. It is common cause that the applicant had accumulated 48,8 days annual leave at the time of his dismissal. The respondent paid him for 40 days.
- [2] Mr Lawrence for the respondent contended, firstly, that Chapter III of the Basic Conditions of Employment Act No 75 of 1977 (the "BCEA") did not apply, as the leave provisions offered by the respondent were better than the statutory minimum.
- [3] Secondly, in terms of its policy, employees were precluded from accumulating leave in excess of 40 days which, therefore, was the maximum payable to the applicant on dismissal.
- [4] Section 19(2) of the BCEA provides:
- "Unless an agreement provides otherwise, this chapter does not apply to leave granted to an employee in excess of the employee's entitlement under this chapter."

I interpret this to mean that the Chapter does not apply to the excess leave. It remains applicable to leave granted in terms of the Chapter.

[5] The word "agreement" is defined to include a collective agreement. As the BCEA does not take the definition further, the ordinary meaning of the word applies.

[6] No evidence has been led of any agreement that deals comprehensively with leave. Reliance has been placed on extracts from the respondent's personnel procedures manual relating to annual leave. The terms of the contract of employment were implied from this.

[7] Mr Lawrence submitted that the applicant was granted 20 working days leave per annum, which was in excess of the statutory minimum of 21 consecutive days stipulated in section 20(2)(a) of the BCEA. Furthermore, the respondent's policy provided employees with a facility to accumulate leave which section 20(4) of the BCEA does not permit them to do.

[8] Ms Reddy disputed that the leave was calculated on the basis of working days and not consecutive calendar days. In support of this she relied on the reference to the BCEA in clause C2.5 of the policy quoted below. With

regard to the accumulated leave facility she contended that section 20(4) dealt with when leave must be taken. It did not deal with the payment for leave accrued. That, she said, was covered by section 40(b).

[9] Clause C2(5) of the policy provides:

"General provision.

The following provisions apply to both the above categories of staff:

In terms of the BCEA employees must be granted at least twenty-one consecutive calendar days annual leave on full remuneration in respect of each leave cycle. However, an employee's annual leave entitlement may be reduced by the number of days occasional leave requested by the employee during that leave cycle. In terms of company policy, at least ten working days leave should be consecutive and taken within 6 months of falling due, while the remainder may be fragmented.

Management at all levels must ensure that the company's leave policy is strictly adhered to and that employees take their annual leave whenever it is due during the course of their employment. In the unlikely event that employees do not take leave when they are required to do so, managers will be required to keep a written record of the reasons surrounding such failure to take leave, at the time this event takes place. In such instances the written permission of the Divisional Managing Director, acting in consultation with the Divisional Human Resources Director, will have to be obtained before any payment is made for leave accrued in excess of the maximum allowed.

Leave is accumulated from the employee's date of engagement.

None of the statutory public holidays (refer C13) is regarded as a working day for the purposes of leave calculation.

For agricultural employees, leave accrues at the rate of 1,42 days per completed month of service for employees entitled to 17 working days per annum and 1,83 days per completed month of service for employees entitled to twenty-two working days per annum."

[10] The reference in clause C2.5 and C2.6 quoted below is to working days, not

ordinary or consecutive days or statutory public holidays. This is quite obvious from the last two sentences of clause C2.5 quoted above.

[11] The applicant also admitted in reply at paragraph 11 that working days are taken to calculate annual leave. Twenty working days leave exceeds the statutory minimum of twenty-one consecutive days by about five working days per annum.

[12] Mr Lawrence submitted as the second basis on which the respondent's leave policy exceeded the statutory minimum is that it permitted the accumulation and payment for leave not taken within six months as prescribed by section 20(4).

Section 20(4) provides:

"An employer must grant annual leave not later than six months after the end of the annual leave cycle."

[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.

[14] Read in the context of this purpose, section 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 cycle. Leave not taken within six months is not automatically forfeited.

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

[16] Nothing in section 20, however, prevents an employer from requiring an employee to take annual leave in terms of section 20(4).

[17] Clause C2.5 of the policy is consistent with this interpretation of section 20(4), in that, firstly, it permits the fragmentation of leave at the request of employees. Secondly, it reinforces the duty of the management of the respondent to ensure that leave is taken.

[18] Not only is the policy an enforcement of the rights and protection of employees, but also a means for the respondent to control the cost of labour. The latter objective is not inconsistent with section 20(4), provided it does not undermine the former.

[19] Whether the facility *per se* of accumulating leave is a term of the employment contract that was superior to the BCEA depends on whether

the BCEA, in particular section 40(b), sanctions the forfeiture of leave which is in excess of the statutory minimum and which has not been taken. If it does not, then the BCEA will be more favourable to the applicant.

[20] The respondent's policy provides at clause C2.6 as follows:

"C2.6 Accumulation

Not more than one week (five working days) may be accumulated per annum, up to a maximum of 40 working days. This means that the absolute minimum number of days leave due to an employee at any one time will be sixty days (i.e. the maximum accumulation of 40 days plus the current year's leave). After attaining the age of fifty-five years of age, employees may accumulate up to a maximum of 60 working days paid leave which may be paid out on retirement, provided that the accumulation does not exceed one week's leave per annum.

At the discretion of the Human Resources Director, any leave accumulated in excess of the normal entitlement is liable to forfeiture and, in any event, should an employee terminate his services (other than by retirement, retrenchment or death in service) he will not be paid out for more than a total of 40 days, inclusive of current leave.

Where an employee retires or is retrenched or dies in service, the minimum number of days leave payable at termination date is 60, inclusive of current leave."

[21] Section 40(b) of the BCEA provides that on termination of employment, an employer must pay an employee:

"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.”

[22] Although the accumulation of leave at the instance of an employee is not prohibited by section 20(4), section 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 section 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 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, section 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 section 20(4) nor 40(b) precludes an employee from accumulating

leave or being paid for it. In the case of section 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, section 40(b) prevails over the forfeiture provisions of clause 2.6.

[27] I find, therefore, that the only respect in which the respondent's policy exceeds the BCEA is in the calculation of annual leave on the basis of working days and not consecutive days. It follows that in terms of section 19(2) of the BCEA, Chapter III would not apply to the period of annual leave in excess of the statutory minimum of 21 consecutive days amounting in this case to about five days per annum, the balance of which now remaining due being 8,8 days.

[28] It would follow from this interpretation and application of the law to Clause 2.6 that the respondent would have no obligation to pay the applicant the annual leave in excess of the statutory minimum. However, that is also not the end of the matter.

[29] Given the facts of this case, the excess is not an unenforceable claim. The respondent had an obligation to pay the excess because, firstly, in terms of section 20(4) read with clause 2.5 of the policy, the respondent had to

ensure that the applicant took his annual leave whenever it was due during the course of his employment. This it failed to do.

[30] Secondly, the respondent omitted to keep a written record of the reasons surrounding his failure or inability to take leave.

[31] Thirdly, the applicant was suspended and eventually dismissed at the instance of the respondent. The applicant was therefore deprived of his right in terms of the respondent's policy to take leave during his employment by circumstances beyond his control.

[32] I accordingly reject the submission by Mr Lawrence that the applicant caused his dismissal because of his alleged misconduct. Dismissal for misconduct terminates employment at the instance of the employer, not the employee.

[33] Finally, I agree with Ms Reddy that before the Human Resources Director exercised his or her discretion to forfeit the excess leave in terms of Clause 2.6, the applicant ought to have been heard. The failure to do so is at the very least procedurally unfair.

[34] In granting an order in terms of paragraph 1, I include the claims that are admitted and for which there has been a tender.

PILLAY, J