

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE No: C 223/04

In the matter between:

MOEGAMAT NOEG MARTIN

APPLICANT

AND

THE WESTERN CAPE EDUCATION

DEPARTMENT

1ST

RESPONDENT

THE MINISTER OF EDUCATION

2ND

RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

- 1] The applicant who was prior to his resignation employed as a teacher by the first respondent resigned and thereafter filed this claim in terms of section

77(3) of the Basic Condition of Employment Act No 75 of 1995 (“the Act”). The claim was consequent to the non-payment of leave days accrued by the applicant whilst he was in the employ of the first respondent. The applicant claimed that the value of the accrued leave was R43051.63.

- 2] The second respondent opposed the claim.

Background facts

- 3] At the time of his resignation the applicant had been in the employ of the first respondent for over ten years and was based at South Peninsula Secondary school. The teaching responsibilities of the applicant focused mainly on economics and accounting subjects. The applicant tendered his resignation as a teacher on the 31 May 2001, and as at that date had accumulated 150 (hundred and fifty) leave days but was paid out for only 10 (ten) days of the accumulated leave days. In the relevant part of the resignation letter the applicant states:

“Over the period of service to the WCED spanning 12.5 years, I have accumulated about 150 days [12 days x 125 years] leave which I have not. had need to take and lately have been **unable** to take due to **service delivery requirements**. I am using this letter as a request that all (sic) accumulated leave be paid to me as soon as possible.”

- 4] It is apparent that a copy of this letter was forwarded to the principal who inserted hand written notes dated 15 May 2001, and forwarded it to the respondent. The hand written notes reads:

“Mr Martin (Persal no 50446223) has never been granted leave at the school due to the fact that WCED would not grant school a substitute. Mr Martin should be paid out for the leave owing to him. Not to do so will constitute an unfair labour practice.”

- 5] The applicant testified that at the time of his appointment he was entitled to accumulate leave in the amount of 12 (twelve) working days per annum. In this regard the applicant pleaded that it was express or implied term of his contract that:

“2.2.1 he was not required to make use of any annual leave entitlements during any period in which annual leave accrued, or thereafter, if he elected not to do so; and

2.2.2 *he would nevertheless accrue any period of unused annual leave from year to year;*

2.2.3 *in the event of his employment ceasing for whatever reason, he would be entitled to receive payment for any period of accumulated unused leave entitlement within 7 days of date of termination of employment.”*

- 6] The applicant testified that he was unable to take leave during his employment with the respondent for a number of reasons. The reasons are set out in the statement of case as:

“ 2.3.1 the lack of resources at the previously disadvantage community

schools resulted in such school's (sic) inability to increase fees so as to accommodate additional teaching staff, so as to permit educators an opportunity to make use of their leave entitlement;

2.2.2 the First Respondent initiated several restructuring and downsizing exercises during the period and during which time many teaching posts were declared "in excess" and made redundant. The result was that unless the First Respondent's schools could afford to subsidize additional educators of their own, they were confronted with having less teaching staff in order to fulfill the normal tasks and duties. The applicant was thus unable to apply for annual leave as a result of operational requirements;

2.2.3 the First Respondent further issued a circular indicating that although educators could apply for annual leave it would not be authorized unless:

2.3.3.1 an alternative placement teacher could be located, which

would have to be by the school utilizing its own funds; or

2.3.2 if operational requirements of the school permitted the granting of such leave."

Bargaining councils' resolutions

7] It is common cause that at the time of his appointment and before the ELRC's resolution 7 of 2001 ("the ELRC resolution") came into effect the applicant was entitled to accumulate 12 (twelve) days leave per annum. He was entitled to elect whether or not to use his accrued leave days. At the time of his resignation as stated earlier the applicant had accumulated 150 (hundred and fifty) days but was paid only for 10 (ten) days.

8] The ELRC resolution was adopted pursuant the provisions of the PSCBC Resolution 7 of 2000 which provided under clause 7.1(a) that:

“a) The annual leave dispensation in this agreement shall provide a framework that may be further refined, subject to service delivery requirements of any sector.”

Clause 7.3(a) of the PSCBC resolution which deals with payout of annual leave provides:

“a) Employees, who in terms of the dispensation applicable prior to 1st July 2000, have earned audited leave accrued in terms of that dispensation, shall retain the same. The employer shall pay such accrued leave on:

i) Death;

(ii) Retrenchment;

(iii) Medical boarding.”

9] The purpose of the ELRC resolution was to replace the leave regulations which were operative prior to the PSCBC resolution coming into effect. In other words the ELRC resolution provided for a new leave regime. Clause 3.8 of the ELRC resolution provides that at least 10 (ten) working days must be taken as leave during the annual leave circle. The leave accrued during the leave circle must be taken no later than 6 (six) months after the expiry of the relevant leave circle. If not taken the accrued days are forfeited.

10] Clause 5 deals with leave accrued before 1st July 2000, and during the period 1st

July 2001, to 31st December 2002. In terms of this clause an educator is required to obtain all accredited leave credits accrued prior to 1st July 2000, for the purpose of converting such accrued leave days to working days. The number of days which were not granted to an educator since 1st July 2000, were to be added to the number of leave days accrued prior to July 2000.

- 11] Clause 5.2 of the ELRC resolution deals with the conditions in respect of which the payouts for leave are to be made. The conditions that would qualify an educator for the payment of accrued leave are the same as those provided for by the PSCBC resolution. The additional condition provided for by the ELRC resolution relates to early retirement. The leave credits are to be paid upon; (a) the death; or (b) retirement, including early retirement; or (c) medical boarding. Both resolutions are silent about what happens to employees who resign.

Issues for determination

- 12] The issues which the Court is required to determine are:
- a. Is the applicant entitled to payment in the amount of R43051.63 being then 140 accrued leave days.
 - b. Was the refusal to pay for the accrued leave days unfair?
 - c. Did the respondent act inconsistently in the manner in which it dealt

with the payment of accrued leave days?

13] In the absence of an express term in the ELRC resolution authorizing payment for accrued leave in the event of resignation, the question is whether this event should be implied into the resolution.

14] The applicant contended that although the ELRC resolution, provides for payment of accrued leave on retirement, death or medical boarding, he was entitled to receive payment of his accumulated leave. In essence this case, in my view, turns around the interpretation and application of the ELRC resolution.

15] Mr Madima, respondent's counsel, argued that the fact that no reference is made to employees who resign in clause 5.2 means that such employees are excluded from the provisions of this clause.

16] The enquiry to determine whether a term should be implied into a contract was described by Corbett AJA in *Alfred McAlphine & Son (Pty) Ltd v TVL Provincial Administration* 1974 3 SA 531 (A) at 532 as:

“...an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties.”

17] In *Union Government (Minister of Railways) v Faux Ltd* 1916 AD 105 at 112 Solomon JA said:

“Now it is needless to say that a Court should be very slow to imply a term in a contract which is not to be found there, more particularly in a case like present, where in the printed conditions the whole subject is dealt with in the greatest detail; and where the condition which we are asked to (sic) imply is one of the very greatest importance on a matter which could not have been absent from the minds of the parties at the time when the agreement was made.”

18] The court in *Cassim v Kadir* 1962 2 SA 473 (N) per Miller J, dealing with the same issue, said:

“The contract, in its existing form, is therefore efficacious and complete and needs no addition in the form of an implied term.”

19] R H Christy in the *Law of Contract* (2006 5th edition, lexisnexisButterworth, Durban) page 171 states:

“ ... it is necessary to prove, by preponderance of probabilities, conduct and circumstances which are so unequivocal that the parties must have been satisfied that they were in agreement on the tacit term. If the court is satisfied on the preponderances of probabilities that the parties reached agreement in

that manner it may find the tacit term established.”

- 20] The authorities are in agreement that the intention of the parties plays a critical role in the assessment of whether to imply a term into a contract. See *Barnabas Plein & Co v Sol Jacobs & Sons* 1928 AD 25, *Techni- Pak Sales (Pty) Ltd v Hall* 1968 3 SA 231(W) and *Richard Ellis South Africa (Pty) Ltd v Miller* 1990 1 SA 453.
- 21] Before deciding whether an implied term is to be imported into a contract, the express terms of the contract must be examined. In this regard the inquiry is whether, having regard to the expressed terms of the agreement, the alleged implied term can be implied into the contract. See *Pan American World Airways Inc v SA Fire & Accident Insurance Co Ltd* 1965 3 SA 150 (A) 175.
- 22] The issue of whether the applicant is entitled to be paid the accrued leave, can be resolved through ascertaining from the language used in the interpretation which the parties at the ELRC meant to express when they left out resignation as one of the events that would qualify educators for payment of their accrued leave. In ascertaining this intention, regard must be had to the language and the framework within which the resolution was concluded.
- 23] If the parties in adopting the resolution intended to include resignation as one of the events that would qualify for the payment of the accrued leave they would have said so.

The wording and the circumstances of this case does not support a view that the parties had intended resignation to be an event to be implied into the resolution. It should be borne in mind that the resolution was concluded pursuant to the framework which was set out by the PSCBC resolution which is also silent about resignation.

24] In my view, it cannot be presumed that the ELRC resolution impliedly conferred the right to claim for payment of accrued leave in the event of an educator resigning. It is further my view that it would be stretching the construction of the ELRC resolution, beyond the limits to imply that the right to claim for payment of accrued leave in the event of resignation when both the PSCBC and the ELRC resolutions are silent on the very issue. In fact it is apparent from the reading of the resolution that the parties intended to exclude resignation as an event that would qualify an educator for payment of the accrued leave.

25] Turning to the issue of not being able to take leave, the applicant contended that he was unable to take leave because of the factors mentioned above at paragraph 6 of this judgment. In other words the reason for him not taking his leave should be blamed on the respondent. This issue was raised, probably in the context of the provisions of clause 5.5 of the ELRC resolution. Clause 5.5 provides:

“The Head of Department shall determine procedures and measures in keeping with service delivery needs, on how educators will be allowed to utilize their leave credits accrued prior to the applicable dates referred to in paragraph 5.1 above over and above the normal vacation

entitlements.”

26] Mr Madima, correctly, argued that the obligation was on the employee to apply for leave and had he applied for leave the respondent may have granted it or would have paid for it in lieu of such leave being denied. The applicant conceded during cross examination that he would have been given leave had he applied for it and that the responsibility was on the school to find a replacement during his absence. The respondent can therefore not be blamed for the applicant’s failure to go on leave. A different consideration would have applied had the applicant shown that it was due to the respondent that he was unable to go on leave.

27] As concerning the allegation of inconsistent and unfairness in the payment of the accrued leave, the applicant could not take this issue further than the allegation itself. He testified under cross examination that he could not say what part of leave was paid to those that he claimed had been paid for their accrued leave.

28] The applicant also contended the 10 (ten) days accrued leave which the applicant paid for, was paid after the 7 (seven) days within which the payment should have been affected had expired and therefore it should have been paid with interest. This has not been pleaded to.

29] I do not believe that the applicant acted unreasonably in instituting this claim and accordingly, costs should not follow the result.

30] In the premises the applicant's claim is dismissed.

31] There is no order as to costs.

MOLAHLEHI J

DATE OF HEARING: 13 SEPTEMBER 2007

DATE OF JUDGMENT: 06 DECEMBER 2007

APPEARANCES

For the Applicant: G B Marinus of Jan S Deviliers Attorneys

For the Respondent: Adv Madima

Instructed by: The State Attorney