IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

Case no: D14/07 and D15/07
Reportable

In the matters between:

JURY JOHANNES MINNY **Joint applicants**
and
BURKHARD GOTTSMANN

and

SMART PLAN CC **Respondent**

JUDGMENT

VAN NIEKERK J

Introduction

[1] Section 20 of the Basic Conditions of Employment Act, 75 of 1997 (BCEA) requires an employer to grant an employee, in each annual leave cycle, 21 consecutive days' leave on full pay. The employer must grant annual leave not later than six months after the end of a leave cycle, defined as the period of 12 months' employment with the same employer immediately following the employee's commencement of employment, or the completion of that employee's prior leave cycle. Section 21 of the BCEA requires that an employer must pay an employee leave pay at least

equivalent to the remuneration that the employee would have received for working for a period of annual leave. Leave pay must be paid before the beginning of the period of leave, or by agreement, on the employee's usual pay day (s 21(2)). On termination of an employee's employment, s 40 of the BCEA requires an employer to pay the employee the value of any annual leave that is due to the employee in respect of a prior leave cycle but which the employee has not been taken, as well as the value of leave accrued during any current but incomplete cycle.[1]

[2] In these proceedings, the applicants claim the value of annual leave that they contend accrued to them in the leave cycle prior to their respective resignations from the respondent's employ, and the value of leave accrued during the cycles rendered incomplete by virtue of the termination of their employment.

Matters of common cause

[3] It is common cause that Gottsmann was employed by the respondent from 1 September 2001, and Minny from 18 November 2002. Both resigned with effect from 28 February 2006. In a statement of agreed issues, the parties agreed that the applicants' claims were claims brought in terms of sections 20, 21, 35 and 40 of the BCEA. The parties have also reached agreement on the quantum of each of the applicants' claims. Minny avers that in respect of the leave cycle that commenced on 18 November 2004 and ended on 17 November 2005, he was granted 5 days leave, during January 2006. He deducts the value of that leave and an amount of R3274 paid by the respondent on termination of his employment in respect of accrued leave, and claims a balance of R20 054.00. Gottsmann claims that in respect of the annual leave cycle that commenced on 1

1 An employee's claim is limited to the value of leave in the preceding leave cycle and on a pro rate basis, leave accrued in any incomplete leave cycle. See *Jooste v Kohler Packaging Ltd* [2003] 12 BLLR 1251 (LC).

September 2004 and ended on 31 August 2005, he was granted 10 days leave during November and December 2005. He deducts the value of this leave and the payment of R3286.98 made to him by the respondent on termination of his employment in respect of accrued leave and claims a total R23 899.65.

[4] The sole issue to be determined in these proceedings is whether the respondent is indebted to the applicants for the leave pay that they claim. The applicants contend that the annual leave taken by them was without pay, and that they were not paid the full value of the annual leave that had accrued to them prior to their resignation. The respondent contends that it is not indebted to the applicants, on the basis that each of the respondents was paid a fixed hourly rate of remuneration that was calculated to be an all-inclusive rate, including payment in respect of annual leave and sick leave. Put another way, the respondent's case is that the applicants' remuneration packages were structured so as to pay them the value of their annual leave, as it accrued from month to month, in advance of their taking leave. It was accordingly for the applicants (who to some extent regulated their own working hours) to manage their finances so that when they took annual leave, they had the resources to do so.[2]

Jurisdiction

2 Although the facts of this case have an obvious impact on the applicants' entitlement to payment for sick leave taken during the course of their employment, their claim is confined to payment for annual leave. Payment of an all-inclusive rate for sick leave raises different and significant difficulties since unlike annual leave, it is not leave to which all employees will necessarily become entitled during any sick leave cycle. The extent of sick leave taken is hardly foreseeable, and will vary from employee to employee. Is the employee to refund any amount paid in advance for sick leave if no sick leave is taken in a three-year sick leave cycle? See s 22 of the BCEA.

[5] I deal first with the question of jurisdiction. The applicants' baldy assert that this court had jurisdiction to entertain their claim pleaded, as it is, in the form of a complaint under the BCEA of a failure by the respondent to comply with section 21 of the Act. The provisions of the BCEA that concern the enforcement of basic conditions of employment require that allegations of non-compliance with the Act must in the first instance be referred to a labour inspector and dealt with in terms of s 68 of the Act. If necessary, the inspector must issue a compliance order in terms of s 69. Section 70 places limitations on the powers of labour inspectors to issue compliance orders. Section 70 (b) provides that if the employee making the complaint is a senior managerial employee, or if the employee concerned earns remuneration in excess of a prescribed threshold, then the labour inspector may not issue a compliance order.[3]

[6] How then must employees subject to these limitations, whether by virtue of their occupation or the level of their remuneration enforce their rights to basic conditions of employment? The BCEA is not entirely clear. When an unfair dismissal claim is referred to this court, s 74 empowers the court to determine any claim for an amount owing to an employee in terms of the BCEA provided that the claim is referred in terms of s 191, that the amount had not been owing for more than a year prior to the date of dismissal, and that no compliance order had been made or other proceedings instituted to recover the amount. These would appear to be the only circumstances where this court, as a court of first instance, may determine any claim under the BCEA. In a case such as the present, where no unfair dismissal is claimed, the only remedy available to an employee who wishes to recover an amount that the employee contends is owing under the Act is a contractual remedy. Section 4 of the Act provides that a basic condition of employment (defined in section 1 to

3 It is common cause that the applicants earned in excess of the threshold fixed by s 6(3) and which applied at the time of the termination of their employment.

include a provision of the Act that stipulates a minimum term or condition of employment) constitutes a term of every contract of employment. There are certain exceptions to this provision, including a term of a contract that is more favourable to the employee than a basic condition of employment (see section 4(c)). Section 77(3) of the Act confers concurrent jurisdiction on this court (with the civil courts) to hear and determine any matter concerning a contract of employment, irrespective of whether a basic condition of employment constitutes a term of the contract. Any claim to enforce a provision of the Act in circumstances where the employee is denied access to the enforcement measures established by Part A of Chapter 10 of the Act, must therefore be brought under section 77(3) as a claim of breach of contract.

[7] This claim has a long history, having initially been made in the Magistrates' Court, and for reasons that are not apparent, withdrawn and thereafter filed in this court. Although the applicants claim is not specifically pleaded as a contractual claim (the language of their respective statements of claim is that of reliance on a statutory entitlement) the papers filed are such that I am able to regard references to statutory entitlements (in the form specifically of rights under ss 20 and 21 of the BCEA) as references to the terms of the applicants' respective contracts of employment. Little purpose would be served in further delaying the determination of this matter only to require the applicants to formulate their claim with more precision. I intend therefore to treat this matter as a contractual claim brought under s 77(3) of the Act, and to determine it on that basis.

The onus of proof

[8] In relation to the onus of proof, the applicants submit that section 81 of the BCEA provides that a party that alleges a right conferred by the Act must prove the facts that constitute the infringement, and that the party allegedly engaged in the conduct in question must then prove that the conduct did not infringe the Act. On this basis, the applicants contend that to the extent that they have adduced facts to establish that they have been denied payment of the value of the annual leave that has accrued to them, the respondent bears the onus to establish that its conduct does not infringe any provision of the Act. There is no merit in this submission. First, the nature of the applicants' claim, for the reasons recorded above, is not one that arises from the Act rather than from their contracts of employment. Secondly, and in any event, s 81 applies only to Part C of Chapter 10 of the Act, a part concerned with the protection of employees against discrimination for exercising rights under the Act, or, in other words, victimisation. The applicants' do not claim that they have been victimised for exercising a statutory right - they in effect seek to have a right afforded them by the statute enforced as a contractual term. In so far as the applicants' claim is based on a contractual term and a breach of it, they accordingly bear the onus of proof to establish both the terms of the contract and the breach. In these proceedings, the terms of the contract between the applicants and the respondents are not in dispute, at least not as far as any entitlement to annual leave is concerned. The respondent accepts that the applicants are entitled to 21 consecutive days' annually leave in each leave cycle, and that the applicants are entitled to be paid for that leave. The applicants' claim is that the respondent breached their contracts by failing to pay them for annual leave taken and accrued. It is incumbent on the applicants to establish that breach.

Brief summary of the evidence

[9] I do not intend to summarise all of the evidence given at the hearing of this matter. Much of the evidence given by the applicants related to the bundles of documents prepared by each of them, replete as they were with clocking histories, time sheets and payslips. Mr Cecil Smart, the sole member of the respondent, gave evidence which largely concerned the nature of the "all inclusive rate" that the respondent contends was paid to the applicants. It is common cause that the respondent operates as a labour broker (or a temporary employment service, to use the language of section 198 of the Labour Relations Act). The applicants were initially employed in terms of a standard form contract of employment, for a fixed term of twelve months. In relation to remuneration, paragraph 4.2 of the contract provides:

> "Remuneration for hours worked shall at all times be, subject to an official Timesheet approved by the CLIENT/EMPLOYER".

Paragraph 13 deals with leave of absence. That paragraph reads:

> "13.1 The EMPLOYEE shall give two weeks notice of intended absence from work, no leave other than leave for expected illness will be acceptable. In case of absence without appropriate leave, paragraph 14 shall apply.
>
> 13.2 Leave conditions are strictly on "No work No Pay principle".

[10] It is common cause that both Gottsmann and Minny remained employed by the respondent long after the lapse of the fixed term, and neither party disputed that the terms of the contract continued to regulate the applicants' employment. During the course of their employment, the

applicants' services were placed at the disposal of a number of the respondent's clients. Gottsmann testified that prior to his resignation, he was engaged at the Hillside Aluminium site. His hours of work were recorded by a clocking system, on the basis of which he completed a time sheet that was submitted to the respondent. Gottsmann stated that he was paid for hours worked - hours worked were "booked" to the project concerned, and on the basis of the time sheets submitted to the respondent, the respondent paid him an agreed hourly rate, the total for each month being consolidated and reflected on a monthly payslip, reflecting deductions in respect of PAYE, UIF, etc. Gottsmann testified further that the terms of his employment were such that a principle of "no work, no pay" applied - if he took annual leave, no time sheet was submitted for the period of leave and he was not paid for that period. In 2005, the respondent approached him with what was termed a "collective agreement". The agreement records that in the past, the respondent agreed to pay an all-inclusive hourly rate without separately reflecting annual leave, and that with effect from 1 January 2006, the leave and sick leave component previously added to the hourly rate would be separated from that rate, reflected separately on pay slips, and that leave and leave pay would be administered in terms of the Act. Sick leave not taken during any year would be paid out the employee concerned at the end of each year. A revised contract of employment reflecting these terms was also presented to Gottsmann for signature. Gottsmann refused to accept the new system and in the face of the respondent's insistence that he do, he resigned. On his final payslip, dated 25 February 2006, an amount of R3286.98 was paid to Gottsmann, and reflected as "leave pay paid out".

[11] Minny's evidence reflected that of Gottsmann in so far as the basis of payment was concerned. He also disputed that he had been paid for days that he was absent from work. He too refused to accept the new terms in relation to leave pay and sick leave tabled in November 2005, and

resigned in the face of the respondent's insistence that he accept them. He was paid an amount of R3274.00 in February 2006, reflected as "Leave pay paid out (terminate)".

[12] Smart testified that while the respondent initially utilised the services of TES's, it later engaged in the business of contract work on projects in circumstances where the services of its employees were placed at the disposal of the client. At this time, the respondent's employees were offered a choice in the manner in which their remuneration packages were to be structured. In effect, employees could elect to have the value of annual leave deducted from their rate of remuneration, and have the deducted amounts paid out when the took leave. Alternatively, no deductions for the value of annual leave would be made, but in those circumstances, employees would have to exercise the necessary financial prudence and discipline to ensure that they were able to fund periods of annual leave. Smart testified that all of the respondent's employees, including the applicants, chose the latter option and were paid on that basis.

[13] Smart stated further that the nature of the agreement between the respondent and its clients was that the respondent would be paid an agreed rate for each hour that the applicants worked. The applicants' charge out rate at the time of their resignation was R180 per hour, i.e. the amount paid to the respondent by the client for each hour that the applicant rendered services to the client. The agreement between the respondent and each of the applicants was that they would be paid an amount of R162 per hour for each hour that they worked, being the charge out rate less 10 per cent. From the 10 per cent difference between the charge out rate and the rate of remuneration paid to the applicants, the respondent met the cost of various statutory contributions (including Unemployment Insurance Fund contributions) and the cost of

administering the relevant contracts (in total these amounted to approximately 6 per cent of the charge out rate), with the remaining 4 per cent making up the respondent's profit. Smart produced invoices, dated 20 December 2005, issued to a client (Hillside) in respect of services rendered by Gottsmann and Minny respectively. The invoice reflects a charge for "Hiring of draughtsperson", the number of hours charged (in Gottsmann's case 187 and in Minny's 218), at a unit price of R180.00.

[14] At some point during mid-2005, the respondent, after taking advice from a labour consultant and the Department of Labour, adopted the view that this arrangement amounted to a contravention of the BCEA. The respondent then offered to contract with all of its employees, including the applicants, on the basis that it would each month deduct from their remuneration the value of annual leave and sick leave accrued during the current month, and that these monies would be paid to the employee concerned when the employee was granted annual leave, or when the employee became entitled to sick leave. The applicants refused to agree to this revised arrangement, and demanded that their employment continue without any deductions being made from their remuneration. When the respondent refused to accede to this demand, the applicants resigned and obtained employment with another labour broker who was prepared to contract with them on the terms that they demanded of the respondent. The applicants then sued the respondent in the Magistrates' Court for the value of annual leave which they alleged had accrued to them during the course of the last annual leave cycles of their employment with the respondent, and which they alleged had not been paid to them on termination of their employment.

[15] Finally, Smart provided an explanation for an anomaly that the applicants highlighted in their evidence. Both applicants had testified that in their final month of employment, they "took a chance" and decided to claim leave

pay when submitting their time sheets. This strategem had "paid off" because in the February pay month, each of them had received an amount in respect of leave pay, reflected in the February salary advice. Smart stated that the claims for leave pay had gone through unnoticed at first. When they were detected, he decided that given the circumstances in which he had been attempting to come to some accommodation with the applicants, and as a gesture of goodwill, he would not seek to recover the money. The cost of this payment was for the respondent's account, since it could not be recovered from the client.

The issue

[16] The respondent does not dispute that the applicants were entitled to leave pay, or to be paid the value of any accrued leave pay on termination of their employment. The crisp issue to be decided is whether, as the applicants contend, the respondent breached their contracts of employment by failing to pay them leave pay when they resigned, or whether, as the respondent contends, they were paid their leave pay in advance with the result that nothing further was owing to them on the date of the termination of their employment

Analysis

[17] I deal first with the general principles regulating the payment of leave pay. In so far as s 4 of the Act, read with s 21, requires an employer to pay an employee leave pay equivalent to the remuneration that the employee would have received for working the period of annual leave either before the beginning of the period of leave, or, by agreement, on the employee's usual pay day. In my view, there is nothing in principle in this formulation that precludes an employer from paying an employee an all-inclusive rate, i.e. a rate of remuneration that includes the value of leave as accrued from

week to week, or month to month, as the case may be. In effect, by doing so, the employer discharges its obligation to pay leave pay at a date earlier than that required by the BCEA. Payment for annual leave is on these terms is likely, generally speaking, to be more favourable to the employee than the terms stipulated by the Act.[4]

[18] I am mindful that payment of leave pay in advance may potentially undermine the protections established by the Act. Employees engaged on terms and conditions of employment that contemplate payment of an all inclusive rate per hour and under pressure to maximise their earnings might elect not take annual leave, or be reluctant to avail themselves of sick leave when they are incapacitated. A financial incentive for employees not to take leave thus potentially undermines the recreational and restorative purposes that underlie the right to annual leave. However, the Act requires employers to grant annual leave, and it is incumbent on them to discharge their statutory obligations to ensure that employees take the leave to which they are entitled. Equally, employees are entitled to insist on their rights to paid leave within the periods contemplated by the Act. As Franklin AJ pointed out in *Jooste v Kohler Packaging Ltd*

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4 There may be at least one potential difficulty that may face an employer seeking to pay an all inclusive rate. The first is that s 21 (1) requires an employer to pay leave pay at the employee's rate of remuneration immediately before the beginning of the period of annual leave. It is conceivable that an employee receiving an all inclusive rate of pay will be prejudiced if that employee, during an annual leave cycle, receives an increase in remuneration. If, for example, an employee earns a daily rate of Ra and a month before taking leave the employee receives a 10 per cent salary increase, the value of accrued leave on an all inclusive basis will be calculated at 11 months (say 238 working days) / 17 days x Ra, plus 1 months (say 21.67 working days) / 17 days x (Ra X110%). This will inevitably be less favourable to the employee than the formula of 15 working days x (Ra X110%) whether the employee takes leave or on termination of employment, or on termination of employment claims the value of leave accrued but not taken. In these circumstances, the employer will have failed to comply with s 21(1)(a) and/or s 40 (c). In the present instance, the applicants have not claimed that they were prejudiced in this way, and I take this issue no further.

[2003] 12 BLLR 1251 (LC), the BCEA constitutes social legislation and prohibits the parties from contracting out of its main provisions. The Act does not contemplate that annual leave will not be taken (at para 3.4 of the judgment). In the present instance, the applicants are skilled employees, and sufficiently financially astute to regulate their financial affairs so as ensure that they take the leave to which they are entitled, and to set aside the leave pay component of their remuneration packages to fund periods of leave.

[19] To sum up: in principle, a term of a contract of employment that requires an employer to pay remuneration for a period of annual leave as part of an inclusive rate for work done, in circumstances where that remuneration is paid as when annual leave accrues and in advance of it being taken, does not contravene s 21 of the BCEA.

[20] I turn now to the crux of this case, i.e. the dispute as to whether the applicants were paid for the periods of annual leave taken and accrued by them. The applicants point to the terms of the fixed term contract of employment originally signed by them, which they aver does not establish the system of payment for which the respondent contends. To refer to this document as a contract of employment bestows undue credit on the drafter - conceptually, the document is confused and stylistically, it is a shambles. Clause 13, which seeks to regulate rights to annual leave, does not specifically establish the remuneration structure contended for by the respondent. However, there is nothing in the clause that is inconsistent with the respondent's version that an all-inclusive rate would be paid to the applicants. The stipulation that "leave conditions are strictly on a 'no work, no pay' principle" is consistent with Smart's evidence that since the value of leave pay was incorporated into the rate paid to the applicants, they would receive "double pay" should the respondent be required to remunerate them for any days that they took annual leave.

[21] The so-called “collective agreement” between the respondent and its employees intended to introduce the arrangements to apply after 1 January 2006 is an equally dismal effort at capturing the respondent’s intention. Although the applicants refused to accept the dispensation introduced by the agreement, the preamble to the agreement and its terms are consistent with Smart’s version that prior to 2006, the respondent’s employees were paid an hourly rate that was inclusive of leave pay.

[22] Finally, the applicants’ evidence ultimately amounts to a denial that they were ever paid leave pay, but for the sum paid to each of them in respect of the last month of their employment. In his evidence in chief, for example, when Minny was asked how he would respond to a proposition that he had agreed to payment of an all-inclusive rate, he responded that this had never been stipulated or mentioned. Similarly, Gottsmann did not deny that the rate paid to him was all-inclusive; he testified only that he was not paid for periods of annual leave that he took, begging the question as to whether his rate of remuneration was all-inclusive or not. Both applicants were clearly unhappy with the arrangement that Smart insisted should apply from January 2006.

[23] The tenor of the respondents’ evidence (and this is reflected in the terms of their respective letters of resignation) is that the real source of their unhappiness was the fact that the new arrangement would have the effect of reducing their net income, at least until the completion of a leave cycle and their taking annual leave. On the other hand, Smart’s explanation for the all-inclusive rate, the basis on which it was paid, the reasons for it and the rationale for changing it are all consistent with the documentary evidence, in particular, the invoices addressed to the respondent’s clients and the records of the hourly rates paid to the applicants. Smart’s evidence was not seriously called into question during cross-examination

and the over-riding impression left with the court is that the applicants were labouring under a misconception as to the terms of which their remuneration package was structured.

[24] On balance, I find that the applicants were paid a rate of remuneration that was inclusive of the value of annual leave accrued by them, and that the respondent is accordingly not indebted to them. The parties agreed that costs should follow the result.

I accordingly make the following order:

The applicants' claims are dismissed, with costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of Judgment: 3 June 2009

Appearances
For the Applicant: Advocate P Haasbroek instructed by Schreiber Smith Attorneys
For the Respondent: Advocate M M Posemann instructed by F C Eicker Attorneys