



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 234/12

In the matter between:

FREDERIK HENDRIK COETZER

Applicant

and

CERAGON (SOUTH AFRICA) (PTY) LTD

Respondent

Heard: 10 October 2012

Delivered: 11 October 2012

Summary: Applicant using motion proceedings to bring a contractual claim in terms of section 77(3) of the BCEA – Disputes of fact exist – Court cannot find on papers and evidence before it – Matter referred to trial – Applicant to pay costs as disputes of fact ought to have been foreseen.

JUDGMENT

BOQWANA AJ

Introduction

- 1] The applicant brought an application in terms of section 77(3) of the Basic Conditions of Employment Act¹ ('the BCEA') by way of motion proceedings seeking for an order declaring that the respondent breached an employment contract that existed between the parties and an order directing that an amount of R720 972.31 alternatively an amount determined by this Court, being the amount due to the applicant by the respondent in respect of his outstanding leave.

Brief Facts

- 2] The applicant was employed by the respondent as a Managing Director with effect from 01 June 2007 until he terminated his employment on 16 July 2011 having apparently tendered his resignation on 17 April 2011.
- 3] The salient terms of the written contract of employment which are relevant to this case were as follows:

'10 LEAVE

- 10.1 The employee will be entitled to twenty five consecutive days leave (25 working days) in respect of each completed year of employment.
- 10.2 The employee must take at least 15 working days leave consecutively within 6 months of the cycle within which it accrued.
- 10.3 Leave must be applied for in advance upon at least 1 week's notice. Authorisation for leave must be approved in writing by the employee's manager or his/her designate.

¹ Act 75 of 1997.

- 10.4 The employee agrees that he/she will not be paid in lieu of any leave to which he/she is entitled to in terms of the provisions of this agreement, save as may be due upon termination of employment, as required in law.'

Issues

- 4] The applicant claims that he is owed 74.1653 days of annual leave spanning from 2007 when he joined the respondent as a Managing Director to termination of his employment in 2011, which he accumulated over a period of these years but could not take due to operational requirements of the respondents.
- 5] The respondent submits that the applicant had to take at least 15 working days leave consecutively within six months of the cycle within which it accrued in accordance with clause 10.2 of the contract of employment. Accordingly, if any leave is due, which is denied, it would be for a limited period, which is the last leave cycle before the termination of his employment as all the other leave would have been legally and contractually forfeited.
- 6] The respondent claims that, however, in terms of its records no leave was due to the applicant.
- 7] The applicant has attached two payslips dated 31 May 2011 and 31 July 2011 reflecting leave days due to him being 69.9987 and 74.1653 respectively to substantiate his claim.
- 8] The respondent disputes these payslips claiming that they were obtained dishonestly in that the applicant had instructed the contractor in charge of payroll, one Mr Andre Louw ('Louw') to change leave days due to him literally a few days before he tendered his resignation on 01 April 2011. Louw has confirmed this in his confirmatory affidavit.
- 9] The respondent also accuses the applicant of not being totally honest with this Court in that he fails to disclose that payslips for the period of January,

February, March and April 2011 had “nil” leave days due to him and that the first time any leave days due appear is on the payslip dated 31 May 2011, which is after the applicant’s instruction to Louw and after he had tendered his resignation.

10]The applicant does not dispute that he gave an instruction to Louw but his version is that he instructed Louw to update all the respondent’s employees leave since the records were incomplete especially in relation to him and one Dick Conradie. He attaches to his replying affidavit a spreadsheet apparently prepared by Louw for the period of 18 February 2008 to 1 April 2011 which apparently reflects a total of 73.9154 as at 01 April 2011. This new total is strange because on the 31 May 2011 payslip he attached in the founding affidavit the total leave days due were said to be 69.9987.

11]The respondent further submits that the payslip dated 31 July 2011 which reflects 74.653 leave days due was obtained after the applicant had already left the employ of the applicant as he resigned with effect from 16 July 2011.

12]The applicant further attaches in his replying affidavit an email dated 18 July 2011 purportedly from one Selwyn Watkins who is said to Head of Finance for Africa within the respondent, which email records that an amount of 72 days leave is due to the applicant. He also attaches, in the replying affidavit, again a document dated 30 November 2011 which he calls the respondent’s statement for the month ending November 2011, which document reflects 74.1653 days due to him. According to him, it is interesting that the respondent’s records still reflected that the stated leave days were due to him even long after he resigned. I must agree with the respondent that these are new issues, which in my view, cannot be raised in a replying affidavit. The fact that the applicant invited the respondent to file a supplementary answering affidavit to the extent that new issues were raised is irrelevant as that would have to be done with the necessary leave having been obtained from this Court to do so. Those new issue in my view should be disregarded.

13]The issue that now remains is whether I can determine whether breach of

contract has occurred based on the papers before me. There seems to be consensus from both Counsel that the Court can conclusively find from the papers before it, albeit being marred by disputes of fact (at least from the respondent's point of view). The respondent's attitude is that the applicant persisted with motion proceedings being well aware that there were disputes of fact. The applicant's view is that the only issue the court might not be able to determine in these proceedings, should it find that there was a breach of contract is the quantum. The applicant, therefore, asks that the quantum be referred to oral evidence, if it cannot be determined by the Court in these proceedings.

- 14] The applicant submits that the principles enounced in the *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,² which provides that notwithstanding factual disputes on the papers, if the court is satisfied that the applicant is entitled to relief in view of the facts stated by the respondent together with the facts in the applicant's affidavits which are admitted or have not been denied by the respondent, it will grant the relief sought by the applicant.
- 15] It seems to me that the applicant should have foreseen that there would be dispute of fact in this matter in view of the letter written by the respondent's attorney denying that the respondent was liable for payment of an amount for the 72.07 days leave alleged and various differences in amounts apparent from different documents used by the applicant himself to substantiate his claim, but he chose to use motion proceedings anyway.
- 16] In a Labour Appeal Court recent decision of *South African Football Association v Mangope*,³ where the proceedings relating to an alleged breach of contract were brought in terms of section 77 (3) of the BCEA in a case where a litigant chose motion proceedings, the Murphy AJA held as follows:

'It is trite that an application encompasses pleadings and evidence, all rolled

² 1984 (3) SA 623 (A) at 634E-635.

³ (JA13/11) [2012] ZALAC 27 (7 September 2012), (not yet reported) at para 9.

into one.⁴ The affidavits take the place of the pleadings and the evidence, and formulate the issues of fact between the parties and contain the evidence upon which each wishes to rely. The applicant must set out in the founding affidavit the facts necessary to establish a *prima facie* case in as complete a way as the circumstances demand. The respondent is required in the answering affidavit to set out which of the applicant's allegations he admits and which he denies and to set out his version of the relevant facts. In dealing with the applicant's allegations of fact, the respondent should bear in mind that the affidavit is not solely a pleading and that a statement of lack of knowledge coupled with a challenge to the applicant to prove part of his case does not amount to a denial of the averments of the applicant.⁵ Likewise, failure to deal with an allegation by the applicant amounts to an admission...'

17] The Court however went on to say that:

'The inherently limited form and nature of evidence on affidavit means that on occasion an application will not be able to be properly decided on affidavit, because there are factual disputes which cannot or should not be resolved on the papers in the absence of oral evidence. The various provisions of Rule 7 of the Rules of the Labour Court take cognisance of this reality. Rule 7(3) requires the applicant to set out the material facts in the founding affidavit with sufficient particularity to enable the respondent to reply to them, while Rule 7(4) expects the same on the part of the respondent. Rule 7(7) grants the Labour Court a discretion to deal with an application "in any manner it deems fit", which may include "referring a dispute for the hearing of oral evidence". That discretion, in keeping with general practice and principles applicable in relation to the determination of applications, should be exercised to ensure that justice is done with a view to resolving a dispute of fact. Whether a factual dispute arises from the papers is not a discretionary decision; it is itself a question of fact and, importantly, a jurisdictional pre-requisite for the exercise of the discretion to refer the dispute for the hearing of oral evidence. While the equivalent provision in Rule 6(5) (g) of the High Court Rules is more explicit in this regard, requiring, as it does, the referral to oral evidence to be "with a view to resolving any dispute of fact", there can be no doubt that Rule 7(7) of the Labour Court Rules, being in *pari materia*, should be construed

4 *Rosenberg v South African Pharmacy Board* 1981 (1) SA 22 (A) 30H-31C.

5 *Gemeenskapontwikkelingsraad v Williams* (2) 1977 (3) SA 955 (W).

similarly to that effect.¹⁶

- 18] It is clear to me that there is a myriad of disputes of fact in this case as the issues I have outlined above would bear. In the case of in *Cullen v Haupt*,⁷ Conradie J said:

‘I have consulted some of the better known decisions concerning the referral of applications to evidence or to trial. The leading decision in this regard is, of course, *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162, where Murray AJP said that if a dispute cannot properly be determined it may either be referred to evidence or to trial, or it may be dismissed with costs, ‘particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop’. The next of better known cases on this topic is that of *Conradie v Kleingeld* 1950 (2) SA 594 (O) at 597, where Horwitz J said that a petition may be refused where the applicant at the commencement of the application should have realised that a serious dispute of fact would develop.’

- 19] In a decision of the *National Director of Public Prosecutions v Zuma*,⁸ Harms DP said:

‘Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise in the affidavits, a final order can be granted only if the facts averred in the applicant’s (Mr Zuma’s) affidavits, which have been admitted by the respondent (NDPP), together with the facts alleged by the latter, justifies such order. It may be different if the respondent’s version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers ...’

6 Id at para 10.

7 1988 (4) SA 39 (C) at 40F-H.

8 2009 (2) SA 277 (SCA) at para 26.

20]I have considered this matter long and hard and have come to the conclusion that justice would be best served if this matter is wholly referred to trial. I do not believe that the respondent raises bald allegations as the applicant suggests. To the contrary, it has placed documentary evidence to support its denial of the claim.

21]Whilst, I am inclined to agree with the respondent on the point of law that on proper reading clause 10.2 of the contract of employment read with clause 10.4, the applicant might have forfeited most of the leave claimed and thus not entitled to that part of the leave, which should have been taken in terms of clause 10.2, there are conflicting version as to whether any leave still due at least for the last cycle period before the applicant terminated his employment. Whilst I agree that the respondent has produced payslips that are showing "nil" balance due up to April 2011, and whilst I also accept that the payslips produced by the applicant raise a number of questions in respect of the time they were obtained as well as circumstances under which they were obtained, it seems to me this evidence can properly be canvassed at the trial, with witnesses being brought to cast light on the differing versions that have been produced on the affidavits.

22]The applicant also alleges that he could not take leave due to operational requirements. This point is not fully canvassed on papers by either side.

23]I am alive to the respondent's contention that the applicant chose this route well knowing that there were disputes of fact and therefore the application should be dismissed. I, however, am of the view that in view of the amount claimed, the different payslips produced and the circumstances alleged around how those were obtained as well the allegations made by the parties against one another including those of dishonesty, that the matter be referred to trial where all those would be properly ventilated.

24]I, however, am of the view that the applicant should pay the cost of this application based on the fact that he brought motion proceedings when he should have foreseen that there were material disputes of fact which could

result in this Court not being able to resolve this dispute without those facts being cleared by way of *viva voce* evidence.

25] In the result, I order as follows:

1. The application is referred to trial to deal with the disputes of fact raised in paragraphs 21 and 22 of this judgement.
2. The notice of motion and the founding affidavit shall stand as a statement of case and the answering affidavit as the statement of defence.
3. The parties are ordered to conduct a pre-trial conference in terms of the Labour Court Rules and thereafter file a pre-trial minute within 14 days of this judgement.
4. Thereafter the applicable provisions of the Labour Court Rules shall apply.
5. The applicant shall pay to the respondent the costs of this application up to today.

BOQWANA AJ

ACTING JUDGE OF THE LABOUR COURT

APPEARANCES:

For the applicant: Advocate WP Bekker

Instructed by: Anton Bekker Incorporated, Pretoria

For the respondent: Advocate G. Fourie

Instructed by: Brian Bleazard Attorneys, Parktown