



IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Reportable

Case no. J 2069/11

In the matter between:

SEJAKE CASSIUS SEBATANA

Applicant

And

RATTON LOCAL MUNICIPALITY

First Respondent

GLEN LEKOMANYANE N.O.

Second Respondent

Heard: 06 June 2014

Delivered: 21 January 2015

JUDGMENT

SHAI AJ

Introduction

- [1] This is an application in terms of Section 77(3) and Section 4 of the Basic Conditions of Employment Act 75 of 1997, as amended (“the BCEA”) for an

order, *inter alia* directing the first Respondent to pay the Applicant an amount of R72, 873 in respect of his contractual claim for outstanding remuneration.

- [2] This claim consisted of an amount of leave pay and the deductions made in respect of approved sick leave without pay.
- [3] The first Respondent has since the delivery of this application, paid the Applicant an amount of R38, 064, 75 being an amount for outstanding leave pay.
- [4] It therefore follows that the Applicant's application is only in respect of the difference between the amount paid to him and the amount claimed in the Applicant's Notice of Motion, to wit R34, 808.31. This amount is essentially for the deducted amount for approved sick leave without pay.

The facts

- [5] The Applicant has been employed by the first Respondent with effect from 1 April 2003. He rose within the first Respondent's ranks to the position of Local Economic Development Manager with effect from January 2006 until his resignation on 30 September 2011.
- [6] The Applicant contended that he was on sick leave as contemplated in clause 3.2. of Part B of the Main Collective Agreement and Section 22 and 23 of the BCEA. The said sick leave was for the period from 20 July 2011 to and including 12 September 2011. The Applicant contended that his sick leave cycle had not depleted and notwithstanding the 28 sick leave days he still had sick leave credits.
- [7] Applicant contended that after the said sick leave period of more than 2 consecutive days he submitted all his medical certificates together with his sick leave application forms to the first Respondent's Human Resource Department.
- [8] On the 16 September 2011, he received a letter from the office of the second Respondent, advising him that the said sick leave was approved without pay, notwithstanding that he submitted medical certificate certifying him temporarily unfit to perform his duties for the said period.

- [9] As it became apparent that the Respondents intended to deduct from his salary an amount equal to 28 days' remuneration and that he may for that reason not receive his salary for the period ending September 2011, he immediately called his attorney to dispatch a letter to the first Respondent stating his position regarding the matter.
- [10] In the said letter the Applicant indicated that he has been on sick leave as contemplated in clause 3.2. of Part B of the South African Local Government Bargaining Council Main Collective Agreement, as amended ("the Main Collective Agreement").
- In terms of the said clause, the Applicant contended that he is entitled to 80 days sick leave in a three year leave cycle. Further that, it was confirmed in the letter that he has indeed been on sick leave for the period from 20 July 2011 to and including 12 September 2011 and hence, a total of 28 days.
- [11] The Applicant contended that notwithstanding the fact that he submitted a complete medical certificate for the period of his absence, the Respondents have refused to pay him his entire remuneration for the month of September 2011, or alternatively the Respondents have deducted from his remuneration for the month of September 2011, an amount equal to his gross monthly remuneration.
- [12] On the 23 September 2011, the Respondents replied to Applicant's attorneys' letter of 21 September 2011 and indicated that the Applicant must follow the grievance procedure set out in the South African Local Government Bargaining Council: Grievance Procedure Collective Agreement.
- [13] The essence of the contention of the Respondents is that the court does not have jurisdiction to entertain the dispute as the dispute must be referred to the said Bargaining Council for resolution. The Applicant however, is of the view that the Respondent's conduct is unlawful and amounts to a repudiation of his employment contract with the Respondent. The Applicant's contention is therefore that his dispute is based on the Respondent's breach of his contract of employment, to wit, his right to receive his monthly remuneration and hence contended that this court has jurisdiction to entertain the dispute.

- [14] Clause 3.2.1 of Part B of the Main Collective Agreement provides the following:

“The employer shall grant the employee eighty 80 days sick leave in a three (3) year leave cycle”.

- [15] Clause 3.2.2 of part B of the Main Collective Agreement provides as follows:

“The employee shall be required to submit a medical certificate from a registered medical practitioner if more than two (2) days consecutive days are taken of sick leave as a sick leave”.

- [16] The Applicant contended that he has complied with the above and therefore entitled to receive his full salary for the said month.

- [17] In the main the Respondents' contention is that this court does not have jurisdiction to entertain the dispute. The Applicant was directed to the Local Government Bargaining Council for resolution of the disputes.

Legal issues to be resolved

- [18] In terms of Section 77(1) of the BCEA, subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where the BCEA provides otherwise, the above Honourable Court has exclusive jurisdiction in respect of all matters in terms of this act, except in respect of an offence specified in Sections 43, 44, 46, 48, 90 and 92 of the BCEA.

- [19] In terms of Section 77(3) of the BCEA, the above Honourable 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 a term of that contract.

- [20] Section 4 of the BCEA provides for the following:

A basic condition of employment constitutes a term of any contract of employment except to the extent that-

- a) any other law provides a term that is more favourable to the employee;
- b) the basic condition of employment has been replaced, varied or excluded in accordance with the provisions of this Act

- c) a term of the contract is more favourable than the basic condition of employment.

[21] Section 34 of the BCEA provides for the following:

1. An employer may not make any deduction from an employee's remuneration unless-
 - a) subject to subsection (2), the employee agrees in writing to the deductions in respect of a debt specified in the agreement; or
 - b) the deduction is required or permitted in terms of the law, collective agreement, court order or arbitration award.
2. A deduction in terms of subsection (1)(a) may be made to reimburse an employer for loss or damage only if-
 - a) the loss or damage occurred in the course of employment and; was due to the fault of the employee;
 - b) the employee has followed a fair procedure and has given the employee reasonable opportunity to show cause why the deductions should not be made;
 - c) the total amount of the debt does not exceed the actual amount of the loss or damage; and
 - d) the total deductions from the employee's remuneration in terms of this subsection do not exceed one-quarter of the employee's remuneration in money
3. A deduction in terms of subsection 1(a) in respect of any goods purchased by the employee must specify the nature and quantity of the goods.
4. An employer who deducts an amount from the employee's remuneration in terms of subsection (1) for the payment of another person must pay the person in accordance with the time period and other requirements specified in the agreement, law, court order or arbitration award
5. An employer may not require or permit an employee to-
 - a) repay any remuneration except for overpayments previously made by the employer resulting from an error in calculating the employee's remuneration; or
 - b) acknowledge receipt of an amount greater than the remuneration actually received.

[22] Section 23 (1) of the BCEA provides the following:

An employer is not required to pay an employee in terms of Section 22 if the employee has been absent from work for more than two consecutive days or more on more than two occasions during an eight-week period and, on request by the employer, does not produce a medical certificate stating that the employee was unable to work for the duration of the employee's absence on account of sickness or injury.

[23] Clause 3.2.2 of Part B of the *Main Collective Agreement* provides as follows:

The employee shall be required to submit a medical certificate from a registered medical practitioner if more than two (2) consecutive days are taken of sick leave as sick leave.

[24] Clause 3.2.2 of Part B of the *Main Collective Agreement* provides as follows:

The employee shall be required to submit a medical certificate from a registered medical practitioner if more than two (2) consecutive days are taken of sick leave as sick leave.

[25] Clause 3.2.1 of Part B of the *Main Collective Agreement* provides the following:

The employer shall grant the employee eighty (80) days sick leave in a three (3) year leave cycle.

[26] Clause 3.1.7. of Part B of the *Main Collective Agreement* provides the following:

In the event of the termination of service, an employee shall be paid his leave entitlement calculated in terms of the relevant provisions of the *Basic Conditions Of Employment Act 75 of 1997*, provided that no employer shall be obliged to encash more than 48 days annual leave upon the termination of the employee's contract of employment.

[27] Section 40 of the BCEA provides the following:

On termination of employment, an employer must pay an employee-

- a) for any paid time off that the employee is entitled to in terms of section 10 (3) or 16 (3) that the employee has not taken;
- b) remuneration calculated in accordance to with section 21 (1) that the employee has not taken.

Evaluation

[28] The issue before us is characterised as follows:

“in casu, and notwithstanding the fact that I submitted complete medical certificates for the period of my absence, the Respondents have refused to pay me my entire remuneration for the month of September 2011. Alternatively, the Respondents have deducted from my remuneration for month of September 2011”.

[29] This claim arises out of refusal by the Respondents to approve the Applicant's application for sick leave with pay but instead approved his sick leave without pay. In essence the Applicant was not paid for days he was absent and on leave without pay. In reality we do not have a deduction but rather non-payment of sick leave.

[30] From the foregoing it is clear that the issue of leave is regulated by Main Collective Agreement read with Section 23 of BCEA. What is clear is that there is a dispute about the interpretation and application of the above code.

[31] The main collective agreement provides that:

“1. Intent

1.1. The purpose of this procedure is to establish a common and uniform procedure for the management of grievance and to replace all existing procedures and regulations.

1.2. This procedure is a product of collective bargaining and the application thereof is peremptory.

1.3. The procedure shall be deemed to be a condition of service.

1.4.”

[32] Further that, it provides that:

“4. interpretation and application.

In the event that there is a dispute as to the application and interpretation of this code, such dispute shall be dealt with in terms of the dispute provisions of the Constitution of South Africa Local Government Bargaining Council”.

[33] The procedure as outlined above has become a term of contract/condition of service and hence the contract of employment consist amongst others this procedure. This procedure appears to be the one that must be followed when there is a dispute relating to amongst others the issue of sick leave as outlined above. The usage of the word peremptory with regard to its application is instructive in this regard.

[34] In *casu* the facts bear similarity with the ones that existed in the case of *Public Servants Association of South Africa obo De Bryn v Minister of Safety and Security and another* [2012] 9 BLLR 888 (LAC) wherein the court said the following:

“The Applicant’s complaint clearly concerns the denial of incapacity leave. The alleged right the appellant seeks to assert derives from the provisions of PSCBC resolution as the Labour Court, correctly in our view, found. The resolution deals with leave of absence and what steps an employee should take in case of a dispute arising regarding alternate matters. There is no doubt that the aspect of leave of absence is an issue falling squarely under the PSCBC resolution. In deciding whether the relief sought to be granted the court a quo had to have regard to the provisions of resolution.

Therefore, the court a quo (although of the opinion that the application before it was in terms of Section 158 (1) (a) of the LRA) correctly proceeded to consider whether the LRA required the kind of dispute which existed between the appellant and Respondent to be resolved through arbitration. The court concluded that leave, including incapacity leave and temporary incapacity leave at the Respondent’s organisation, is governed by the provisions of Resolution 5 of 2001 of the PSCB, which is binding collective bargaining agreement. This means that the dispute between the parties was required to be submitted to arbitration as it concerned the application and/or interpretation of the provisions of the PSCBC resolution”.

The LRA regulates and provides the regime as well as the mechanism to deal with disputes of this nature. Section 24 (1) and (2) of the Act provides that:

“(1) Every collective agreement excluding an agency shop agreement concluded in terms of Section 25 or a closed shop agreement concluded in Section 26 or a settlement agreement contemplated in either Section 142 A or 158 (1) (C) must provide for a procedure to resolve any dispute about the interpretation or application of collective agreement. The procedure must first require these parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.

(2) If there is a dispute about the interpretation and application of a collective agreement any party to the dispute may refer the dispute in writing to the commission if-

- a) the collective agreement does not provide for a procedure as required by subsection (1);*
- b) the procedure provide for in the collective agreement is not operative; or*
- c) Any part to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement”.*

[35] In this matter the applicant's contract of employment incorporate the procedure of the Main Collective Agreement which points to the Local Government Bargaining Council for resolution. It is binding on the Applicant.

[36] In the premise I make the following order:

- a) The Labour Court lacks the jurisdiction to entertain the dispute.
- b) The matter is dismissed with costs.

Shai AJ

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr. W Chisora

For the Respondent: Advocate O K Chwaro

Instructed by: Melato Attorneys

LABOUR COURT