THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 87/2021

In the matter between:

MEC FOR ECONOMIC DEVELOPMENT,
ENVIRONMENT AND TOURISM: LIMPOPO **APPELLANT**

and

SELLO REUBEN LEBOHO **RESPONDENT**

Neutral citation: *MEC for Economic Development, Environment and Tourism: Limpopo v Leboho* (87/2021) [2022] ZASCA 131 (6 October 2022)

Coram: GORVEN, MOTHLE and HUGHES JJA and KGOELE and MAKAULA AJJA

Heard: 25 August 2022

Delivered: 6 October 2022

Summary: Contract – calculation of leave days – jurisdiction of the courts – clause 14.1 of the collective agreement between the parties – difference between 'application', 'interpretation' and 'enforcement' of a collective agreement – resolution 7(3) of Regulation 7 of 2000 issued in terms of the Public Service Co-ordinating Bargaining Council – leave credits audited prior to 1 July 2000 – employee entitled to retain those leave credits.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Muller J and Tshidada AJ sitting as court of appeal):

The appeal is dismissed with costs, such costs to include the costs of two counsel where applicable.

JUDGMENT

Makaula AJA (Gorven, Mothle and Hughes JJA and Kgoele AJA concurring):

[1] This appeal originates from an order granted by the Regional Court for the Regional Division of Limpopo, Polokwane (the regional court). It dismissed an action brought by the respondent against the appellant for payment of the amount of R400 000 for leave credits. The respondent appealed to the Limpopo Division of the High Court, Polokwane (the high court) which upheld the appeal with costs. The high court, per Muller J with Tshidada AJ concurring, substituted the order of the regional court with an order that the appellant pay the respondent the amount claimed along with interest and costs. The appeal is before us with the special leave of this Court.

Background Facts

[2] The respondent commenced his employment in the public service in 1970. He worked in various departments until his retirement on 30 April 2014. Prior to his retirement, the appellant's electronic system reflected that he had 454 capped leave credits.[1] Shortly before the respondent retired, the appellant had conducted a final leave audit which concluded that the 454 leave credits were actually unaudited leave credits which had accrued before 1 July 2000. The outcome of this audit was that the appellant calculated that the respondent had only 271 leave credits for which it paid him out on retirement. The respondent, not satisfied with the result of the audit and the

[1] Leave credits are equivalent to leave days. When they have not been taken, there is a formula for payment of leave credits. The formula is not in dispute.

payment he received, issued summons alleging a shortfall of 183 leave credits. His contention was that he was entitled to be paid an amount an R467 204.49 at the applicable rate of R2 553.03 per day. He abandoned the difference and claimed R400 000, presumably to bring it within the jurisdiction of the regional court.

[3] At the trial, the respondent testified and also called Ms Noko Georgina Ngoepe (Ms Ngoepe) as his witness. Ms Ngoepe, who was at the time of her testimony working for the Limpopo Provincial Treasury as a personnel officer testified that, in February 1999 she had audited the leave credits of the respondent. She did so pursuant to the policy of the department in which they were both employed which required an annual audit of leave credits. Ms Ngoepe issued the respondent with a letter reflecting that he had 468 leave credits. It is common cause that after receiving the letter the respondent, utilised 14 of those leave credits, leaving the balance of 454 days.

[4] On 1 July 2000, Resolution 7 of 2000 (the Resolution) came into effect. This was a resolution of the Public Service Co-ordinating Bargaining Council (PSCBC), and it is common cause that it formed part of the contract of employment between the respondent and the appellant in terms of s 23 of the Labour Relations Act 66 of 1995 (LRA). The Resolution introduced a new, unified, leave dispensation. Clause 7.3*(a)* of the Resolution provided:

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

(i) Death;
(ii) Retirement; or
(iii) Medical boarding.'

[5] Ms Ngoepe testified that due to the inconsistency in the calculation of leave credits by various departments, the Acting Director–General of the Department of Public Service and Administration (PSA) issued a directive dated 18 April 2001. The directive read in part 'as you are aware, employees are, in terms of paragraph 7 of the (PSCBC) Resolution 7 of 2000, entitled to annual leave as provided for in the attached Annexure, for utilisation in a leave cycle of twelve months beginning in January and ending in December of each year'. The directive gave an instruction that all leave backlogs in

various departments had to be audited by 30 September 2001. Ms Ngoepe confirmed that they had to implement the Resolution. The sole challenge to the testimony of Ms Ngoepe was that she had not conducted her audit in 1999 in accordance with the Resolution. She readily agreed that she had not done so since it was not operative at that time. The audit had been conducted in accordance with the leave dispensation of the relevant department in February 1999. This was never challenged in cross-examination or by testimony to the contrary.

[6] The respondent in his testimony confirmed his date of appointment and retirement. He further confirmed receiving the letter advising him of the 468 leave credits. According to him, his salary advice dated 13 March 2009 reflected that he had 468 leave credits. In December 2012 he took 14 leave days and thus remained with 454 leave credits. He was aware of the Resolution which directed that calendar days be converted to working days under the new leave dispensation.

[7] In tendering its evidence, the appellant called as a witness Ms Dimakato Zonde Mokwena (Ms Mokwena) who confirmed the evidence of the respondent and Ms Ngoepe in material respects. She accepted that Ms Ngoepe may have audited the respondent's leave credits before the year 2000 and found them to be 468. She agreed that leave credits accumulated before 1 July 2000 were retained and that only after the Resolution came into effect, were calendar days changed to working days for the purpose of auditing.

[8] The cause of action in the particulars of claim is that as at the date of retirement the respondent had 454 leave credits which had accrued to him in terms of clause 7.3(a) of the Resolution. Because they had been audited under the previous dispensation, he was entitled to retain them and receive payment for them on retirement.

The Issues

[9] The appellant in essence relied on two issues in the appeal:

(a) Firstly it contended that the regional and the high courts erred in finding that the regional court had jurisdiction to hear the dispute; and

(b) Secondly it contended that the high court erred in holding that the respondent was entitled to the payment of R400 000 for the 454 leave credits that had accrued to him prior to 1 July 2000.

Jurisdiction

[10] The appellant argued that the dispute between the parties involved the interpretation or application of clause 14.1 of the Resolution. Clause 14.1 reads:

'Disputes about the interpretation and application of this agreement shall be dealt with according to the dispute resolution procedure of the PSCBC.'

According to the appellant, the respondent should have taken the matter for conciliation, mediation or arbitration before the PSCBC instead of taking it to court.

[11] The appellant placed reliance on the matters of *Aucamp v South African Revenue Services*[2] (*Aucamp*) and *Ekurhuleni Municipality v SAMWU obo Members*[3] *(Ekurhuleni)* in arguing that since the respondent was relying on a statutory regulatory provision founded in a collective agreement, the dispute between them was about the interpretation or application of the collective agreement. The appellant submitted that the leave credits and the consequential short payment made to the respondent was irrelevant because the dispute was about the interpretation or application of the collective agreement.

[12] The respondent on the contrary contended that the appellant confuses the two concepts dealt with in Resolution 14.1 namely the 'application' or 'Interpretation' of a collective agreement with its 'enforcement'. The respondent submitted that the enforcement of a collective agreement, as it applies to the respondent's contract of employment, is distinct from 'interpretation' or 'application' thereof as it directly influences the question of jurisdiction. The respondent argued that his case is about the enforcement of or compliance with the Resolution and not its application or interpretation. Relying on *Hospersa obo Tshambi v Department of Health, KwaZulu–Natal* (*Hospersa*),[4] the respondent submitted that the dispute was never about the

[2] *Aucamp v South African Revenue Services* [2013] ZALCJHB 266; [2014] 2 BLLR 152 (LC) paras 21-22.
[3] *Ekurhuleni Metropolitan Municipality v SAMWU obo Members* [2015] 1 BLLR 34 (LAC) para 25-26.
[4] *Hospersa obo Tshambi v Department of Health, KwaZulu-Natal* [2016] ZALAC 10; [2016] 7 BLLR 649 (LAC); (2016) 37 (ILJ) 1839 (LAC).

interpretation of the Resolution nor about its applicability to the dispute but it was about the number of audited leave credits the respondent had accumulated upon retirement.

[13] The submission of the appellant is incorrect as this matter is about the enforcement or compliance with the collective bargaining agreement. *Ekurhuleni* was about the interpretation of the collective agreement and this is confirmed by what the court said:

'. . . it is expressly averred by the respondent that the appellant's action in withholding the salaries and in asking deductions from the salaries . . . , was in breach of the main agreement. The Court thus had to determine whether the main agreement had been breached. This, of necessity, required an interpretation of the main agreement.'[5]

[14] Similarly, in *Aucamp* the court dealt with the issue of jurisdiction and found that the Labour Court had no jurisdiction to hear the dispute because the nature of the dispute involved an unfair labour practice relating to benefits. The court reasoned thus:

'In deciding what is the true issue in dispute in this matter, I have little hesitation in concluding that the issue in dispute is actually about two issues in dispute, the first being an unfair labour practice and the second being the issue of the interpretation and application of collective agreements. . . .'[6]

[15] In *Hospersa*, Sutherland JA dealt with the distinction between 'application' and 'interpretation' on one hand and 'enforcement' on the other in relation collective agreements. The court explained, in this regard:

'A dispute about the interpretation of a collective agreement requires, at minimum, a difference of opinion about what a provision of the agreement means. A dispute about the application of a collective agreement requires, at minimum, a difference of opinion about whether it can be invoked. . . .'[7]

About the enforcement of a collective agreement the court found:

'The bald statement by Thompson and Benjamin that "application" includes "enforcement" is unmotivated and is, in my view, insupportable, if what is meant is that any breach of a collective agreement triggers a right to invoke the collective agreement as a cause of action to be adjudicated, pursuant to section 24. A better reading of Thompson and Benjamin is that it is

[5] Ibid para 22.
[6] Ibid para 20.
[7] Ibid fn 3 para 17.

implied that once "application" is proven, the referring party can procure more than just a declaratory order, and can obtain, pursuant to such finding, substantive relief.'[8]

[16] The respondent's cause of action rests squarely on the enforcement of the collective agreement as was held by Sutherland JA. In argument before us, the appellant was constrained to accept that there were no disputes concerning either the 'interpretation' or 'application' of the Resolution. It clearly applied and there was no issue as to the interpretation of Resolution 7(3)*(a)*. The action had simply been one to enforce what the parties agreed was the employment contract between them. That put paid to the issue concerning jurisdiction and the appellant correctly conceded that the regional court had jurisdiction to decide the claim.

Entitlement to Payment

[17] On the second issue, the appellant submitted that, because the audit of February 1999 had not been in accordance with the provisions of the Minister's directive and had counted calendar days instead of working days, the respondent did not have 454 leave credits but only 271, for which he had been paid. The contention was that a fresh audit of the respondent's leave credits had to be done accordingly.

[18] This, however, disregards the plain meaning of Resolution 7(3) as a whole which reads:

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

(i) death;

(ii) retirement; or

(iii) medical boarding.

(b) Parties to the PSCBC shall negotiate the method of calculating the value and payment of the audited accrued leave.

(c) Where there are no records an audit shall be conducted by the employer in order to determine whether there are periods which are audited or unaudited. Should there be a period which is not audited and a period which is audited then the leave pay-out shall be paid on the

[8] Ibid fn 3 para 22.

basis of 6 days per completed year of service up to 100 days for unaudited leave, plus the value of the audited leave.

(d) The employer shall allow employees to utilise their accrued leave credits accrued prior to 1st July 2000. Departments shall develop procedures and measures to ensure that accrued leave is utilised in a manner that does not detrimentally affect service delivery.'

There is therefore specific provision in Resolution 7(3)*(c)* for persons whose leave credits had not been audited prior to 1 July 2000. It is only those persons who were subject to a subsequent audit. Resolution 7(3)*(a)* makes clear that, where an audit has been conducted under the old dispensation, those leave credits are retained by the employee and paid out, inter alia, on retirement.

[19] When confronted with this in argument, the appellant conceded that this was the position. It is manifestly so. There was no dispute that the audit conducted by Ms Ngoepe in February 1999 had been conducted according to the dispensation operative at the time. As a result, as at 1 July 2000, the respondent retained the leave credit of 468 days. Because he used 14 of these, the balance of 454 leave credits should have been paid to him when he retired. There is accordingly no reason to interfere with the decision of the high court.

[20] Regarding costs, both parties utilised two counsel and agreed that the costs of two counsel were merited. I do not take issue with that position. Furthermore the successful party should be awarded costs of the appeal.

[21] In the result, the following order is issued:

The appeal is dismissed with costs, such costs to include the costs of two counsel where applicable.

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M Makaula

Acting Judge of Appeal

APPEARANCES

For appellant:	Z Z Matebese SC, with M Raphahlelo
Instructed by:	The State Attorney, Polokwane
	The State Attorney, Bloemfontein
For respondent:	R G Beaton SC, with P Eilers
Instructed by:	Pratt Luyt & De Lange Attorneys, Polokwane
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