THE MUNICIPAL COUNCIL OF THE CITY OF WINDHOEK *versus* **PETRUS GERHARDUS SWARTS**

CASE NO.: LC 01/2004

SILUNGWE, P.

2005.10.17

LABOUR LAW – Basic conditions of Employment – Annual Leave – Accumulation of --- - Right to accumulate leave distinguishable from right to payment in lieu of leave - Rule 21(2)(a) of Personnel Rules for Windhoek Municipal limiting to 130 the number of accumulated leave days for which employee can be remunerated on termination of services – Section 39(4)(a) of the Labour Act No 6 of 1992 providing that on termination of employment employer obligated to pay employee full remuneration for any leave accrued but not granted before date of termination – Annual Leave ostensibly designed for restorative purposes for good of employee and employer – Parties to employment contract entitled to regulate any leave or other entitlements in excess of statutory minimum – Respondent's right to accumulate leave days in excess of statutory minimum of 24 consecutive leave days regulated by terms of contract between parties - Applicant's obligation in terms of Rule 21(2)(a) coextensive with obligation created by section 39(4)(a) and so no conflict between term of contract of employment and statutory provision – Statutory expression "--- any leave accrued ---" is a reference to contractual conditions of employment.

LABOUR LAW – Construction of statute – Golden rule of construction – Meaning of expression: "--- any leave accrued ---."

CASE NO.: LC 01/2004

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

THE MUNICIPAL COUNCIL FOR THE CITY OF WINDHOEK
Applicant

and

PETRUS GERHARDUS SWARTS
Respondent

CORAM: Silungwe, President

Heard on: 2004.07.16

Delivered on: 2005.10.14

JUDGMENT

SILUNGWE, P.: In this notice of motion, the applicant seeks an order:

> "1. Declaring that the applicant's condition of service limiting the number of accumulated vacation leave days payable upon termination of

service to 130 days is not in conflict with the Labour Act 6 of 1992 and is accordingly enforceable.

2. Granting the applicant such further and/or alternative relief as this --- Court deems fit."

The applicant is a duly constituted local authority under the Local Authorities Act, No. 23 of 1992, and it is represented by Advocate Smuts, SC. The respondent is a former employee of the applicant and he is represented by Advocate Botes.

The application, which is brought pursuant to section 18 (1)(e) of the Labour Act, No. 6 of 1992 (the Act), concerns a dispute between the parties wherein the respondent claims that the applicant owes him a sum of N$82,282.07 in respect of 135 days of accumulated leave.

It is common cause that the respondent retired on February 28, 2003, after 39 years of service with the applicant. Upon his retirement, the respondent had 265 accumulated vacation leave days to his credit. The applicant was, however, prepared to pay, and actually paid, him for 130 leave days only, thereby leaving a balance of 135 days in respect of which the applicant denied responsibility. Consequently, the respondent approached the Windhoek District Labour Court in an effort to recover the sum of N$82,282.07 for the 135 days of accumulated leave. In its reply, the applicant disputed the respondent's claim to payment for accumulated leave

in excess of 130 days, by virtue of its conditions of employment as stipulated in Rule 21(2) of the Personnel Rules for the Windhoek Municipality (the Rules) which, it pleaded, were binding on the respondent. The Rule provides:

> "21(2) Where an employee or Council terminates that employee's contract of service with Council and the employee has accumulated vacation leave days granted in terms of Rule 18, Council shall pay to the employee, in accordance with the formula referred to in Rule 20(4), the cash value of the accumulated vacation leave days, but Council shall not pay any cash for number of days which exceeds –
>
> (a) in the case of an employee who works a five day working week, 130 days".

It is not in dispute that the respondent worked a five-day working week. Further, it is evident that Rule 21(2) limits to 130 the number of accumulated leave days for which an employee of the applicant can be remunerated upon termination of his/her services.

Advocate Botes contends that Rule 21(2), which is contained in subordinate legislation, is in conflict with section 39(4)(a) of the Act and is thus unenforceable. But Advocate Smuts disagrees, arguing that section 39(4)(a) contemplates remuneration for accumulated leave accrued in the current leave cycle, upon termination of an employee's services. This, continues Advocate Smuts, is the proper interpretation to be placed upon section 39(4)(a) when the section is construed as a whole. Besides, so argues Advocate

Smuts, the respondent's reliance on section 39(4) would, in any case, not arise or apply where parties have agreed upon limiting accrued leave by way of contract, which they did in this matter, as the applicant's conditions of leave specifically provide for the position, pursuant to Rule 21(2) of the Rules.

For ease of reference, section 39(4)(a) reads:

> "39(4) Upon termination of an employee's employment his or her employer shall pay to him or her –
>
> (a) his or her full remuneration in respect of any leave accrued to him or her but was not granted before the date of termination of his or her employment; and
>
> (b) ---"

The question that immediately arises for consideration is whether Rule 21(2) of the Rules is in conflict with section 39(4)(a) of the Act. This is indeed the very essence of paragraph 1 of the Notice of Motion. It is clear from an examination of subrule (2) of Rule 21 and subsection (4)(a) of section 39 that - whereas the subrule expressly limits remuneration for accrued accumulated vacation leave days to 130 days, the subsection is without limitation or qualification. This, *prima facie,* seemingly answers the question posed above in the affirmative. But what is the import of subsection (4)(a) when subsection 39 is construed as a whole? In other words, given a holistic

interpretation of section 39, does the subsection thereof contemplate remuneration only for accumulated leave accrued in the current leave cycle on termination of an employee's services, as Advocate Smuts contends?

In construing a statute, it is normally instructive to commence with the golden or general rule of construction. As Joubert, J.A., put it in *Adampol (Pty) Ltd v Administrator, Transvaal* 1989(3) SA 800 at 804A-C:

> "The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of the exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, e.g. where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent. See: *Venter v Rex* 1907 TS 910 at 913-14; *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 at 813-14; *Shenker v The Master and Another* 1936 AD 136 at 142; *Ebrahim v Minister of the Interior*1977 (1) SA 665 (A) at 678A-G."

See: also *Paxton v Namib Rand Desert Trails (Pty) Ltd* NLLP 1998 (1) 105 NLC at 107; and *S v Russel* 1999 NR 39 at 43F-G.

On a literal reading of section 39 as a whole, I find that the words are "clear and unambiguous" and, indeed, there is no suggestion to the contrary.

Hence, effect should be given to their ordinary meaning. Noticeably, the wording in subsection (4)(a), to wit:

> "(4) Upon termination of an employee's employment his or her employer shall pay to him or her -
>
> (a) his or her full remuneration in respect of <u>any</u> leave which accrued to him or her, but was not granted before the date of termination of his or her employment."

(emphasis is provided) is not, by any stretch of imagination, confined to accrued accumulated leave in a current leave cycle on termination of an employee's employment. It seems to me that the expression:

> "---<u>any</u> leave which accrued---but which was not granted before termination of---employment."

defies limitation or qualification. As Innes, CJ., observed in *R v Hugo* 1926 AD 271:

> " 'Any' in s 16(f) of Act No. 14 of 1911 as amended by s 1 of Act No. 18 of 1925, is 'a word of wide and unqualified generality.'"

See: Dictionary of Legal Words and Phrases, Vol. 1, 1975 ed. 97. And, in *Clarke – Jervoise v Scutt* 190 ICH 382, Eve, J. had this to say:

> " 'Any' is a word of a very wide meaning, and *prima facie* the use of it excludes limitation."

See: Words and Phrases legally defined, Vol. 1, 1988 ed. 92; Stroud's Judicial Dictionary of Words and Phrases, 6th ed. 134.

In his Workplace Law book, 3rd ed., at 60, John Grogon writes, and properly so, in my view:

> "On termination of service, an employee is entitled to be paid for any leave due but not taken, and to leave accrued during an incomplete annual leave cycle---"

See also: Wallis: Labour and Employment Law, 1993 ed., at 17.

Taking cognizance of the golden rule of construction and the contents of the preceding paragraphs in regard to the construction to be placed on section 39 with particular reference to subsection (4)(a) thereof, I am not at all persuaded that the subsection contemplates remuneration only for accumulated leave accrued in the current leave cycle upon termination of an employee's services. This conclusion flies in the face of Franklin, AJ's finding in *Jooste v Kohler Parking Ltd* (2004) 25 IJL 121 (LC) at 126A-B.

A further submission by Advocate Smuts, as previously indicated, is that the respondent's reliance upon section 39(4) of the Act would in any event not

arise or apply where parties have contractually agreed in their conditions of employment, as in *casu*, to specifically limit the employee's entitlement to an accrued accumulated leave where such conditions of leave are more favourable than the statutory minimum.

Advocate Botes, however, contends that the applicant's conditions of employment, based, as they are, on subordinate legislation, must not be in conflict with the Local Authorities Act or any other law, including the Labour Act.

As I see it, the thrust of the issue raised is not limited to subordinate legislation but crisply deals with the question whether the parties in *casu* were entitled to regulate by agreement any leave entitlement in excess of the statutory minimum.

In any case, it is settled law that subordinate legislation must not be in conflict with the enabling legislation. See: The Interpretation of Statutes (by Laurens M. du Plessis), 1986 ed. at 16. E. A. Kellaway, the learned author of Principles of Legal Interpretation puts it this way, at 375:

> "Any provisions in subordinate legislation (for example a Town Planning scheme embodied in a Provincial Ordinance) must be *intra vires* its enabling legislation."

The Personnel Rules for the Windhoek Municipality are a creature of the applicant with the approval of the Minister responsible for Regional and Local Government and Housing, made under section 27(1)(c) of the 1992 Local Authorities Act. Section 25 of the Labour Act, which, like section 29, falls under Part V, headed: Basic Conditions of Employment, stipulates:

> "25. The provisions of this part shall not be construed as preventing an employer from agreeing to or granting any condition of employment which is more favourable to any employee than any condition of employment referred to in this Part."

In similar vein, the Preamble to the Act shows that one of the objects of the Act is:

> "- to lay down certain obligatory minimum basic conditions of service for all employees without inflinging or impairing the right to agree to conditions of service which are more favourable than such basic conditions."

It is thus evident that one of the purposes of the Act is to lay down certain basic conditions of employment. With regard to annual leave, section 39(1)(a) thereof does not more than to prescribe a minimum period of leave on full pay which must be accorded to an employee for each period of 12 consecutive months. However, the actual number of leave days to be granted, the category of workers, the right to accumulate leave days, et cetera, are all matters that are left to parties to regulate by contract,

provided that what is regulated does not fall below, or is not less favourable to an employee than, the basic conditions prescribed by the Act.

Section 39(1)(a) makes the following provision:

> "39(1)(a) An employer shall grant at least 24 consecutive days' leave of absence on full remuneration in respect of each period of 12 consecutive months for which the employee is employed by him or her (hereinafter referred to as leave cycle): Provided that the period of leave may be reduced by the number of days on which the employee was during the relevant leave cycle granted occasional leave on full remuneration at his or her request."

Section 39(1)(a) exists for the protection of employees who might otherwise be denied annual leave. It places an obligation upon an employer to grant an employee at least 24 consecutive days' leave per annum which is enforceable at the instance of the employee. See: *Jardine v Tangaat-Hullet Sugar Ltd;* 2003 24 IJL 1147 (LC) at 1150, para. 14. The said leave is ostensibly designed for restorative purposes for the good of the employee, let alone the good of the employer. Such purposes are undermined in the event of the employer refusing to grant leave, or the employer failing to take leave. In the case of the latter, it is to be observed that no provision exists for any sanctions against the employee. It is thus hardly surprising that paragraph (b) of the subsection precludes the employer from requiring the employee to perform any work during the employee's leave. Besides, section 39(9) provides that:

> "39(9) Subject to the provisions of subsection (4), no employer shall agree with an employee to pay him or her any amount in lieu of leave to which he or she is entitled in terms of subsection (1) or pay such amount to him or her."

On a proper construction, the foregoing subsection is obviously applicable only to an employee whose employment is still subsisting. It is apparent that the subsection serves to encourage employees to take their annual leave regularly.

While section 39(1)(a) prescribes the minimum of 24 consecutive leave days, the applicant's conditions of employment, which find expression in Rule 18(1) of the Rules, provide for 32 working leave days per annum on full remuneration. To this extent, the provision of section 32 working leave days is more favourable than the statutory minimum of 24 consecutive leave days.

The respondent's right to accumulate leave days in excess of the statutory minimum was, in my view, regulated by terms of contract between the parties. The right to accumulate leave is distinguishable from the right to payment in lieu of leave. That this is so was succinctly articulated thus by Franklin, A.J. in *Jooste v Kohler Parking Ltd* (2004) 25 IJL 121 (LC), at 126J-127A:

> "Furthermore, a distinction must be drawn between the right to accumulate leave and the right to payment in lieu of leave. The existence of the former does not imply the existence of the latter. Agreement is required in relation to both."

(Emphasis provided.)

And at 126D, he remarked that:

> "[P]arties to an employment contract are entitled to regulate by agreement any leave (or other) entitlement in excess of the statutory minimum."

See: also 126H where the court expressly held that it was perfectly permissible for parties to agree that leave in excess of the statutory minima may be accumulated and that the employer is obliged to pay remuneration in lieu of any such leave accumulated, but not taken at the date of termination of employment (subject only to a contractual limit).

Hence, the statutory obligation created by section 39(4)(a) is coextensive with the applicant's obligations in terms of Rule 21(2). See: *Dhanser and Others v Nugshoes (Pty) Ltd*, 1966(2) SA 424 at 429A and E. In other words, the statutory expression (section 39(4)(a): "any leave accrued---", is a reference to the contractual conditions of employment between the parties. In the premises, Rule 21(2) and section 39(4)(a) are not in conflict but, rather, they are complementary.

In *casu,* it is not in dispute that, notwithstanding the respondent's full knowledge of the condition of employment stipulated in Rule 21(2), to which he was a party, he still failed, by design, to reduce his accumulated leave days to 130 days by the time that he went into retirement. It would appear that the respondent's wilful disregard of his contractual term of employment was premised on a bona fide (but mistaken) belief that his claim was regulated by section 39(4)(a) of the Act, and that, as such, Rule 21(2) of the Rules was in conflict with the said section, leading him to the conclusion that the rule was of no application to him.

In the circumstances, the applicant's condition of employment "limiting the number of accumulated vacation leave days payable upon termination of service to 130 days" is not in conflict with the Labour Act. Accordingly, the declaratory relief sought by the applicant in paragraph 1 of the Notice of Motion is granted.

As I consider that the respondent neither acted frivolously nor vexatiously, in opposing the application, I make no order as to costs.

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SILUNGWE, J.

ON BEHALF OF THE APPLICANT: **Advocate D. F. Smuts, SC**

Instructed By: **Lorentz & Bone**

ON BEHALF OF THE RESPONDENT: **Advocate L. C. Botes**

Instructed By: **André Louw & Partners**