

NAMPAK CORRUGATED CONTAINERS

APPELLANT

(PIETERMARITZBURG)

and

KISHORE KARSON PATEL

RESPONDENT

Judgment by:

NESTADT, JA

CASE NO. 339/89
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NAMPAK CORRUGATED CONTAINERS

(PIETERMARITZBURG)

APPELLANT

and

KISHORE KARSON PATEL

RESPONDENT

CORAM: VAN HEERDEN, NESTADT, STEYN, F H GROSSKOPF et

GOLDSTONE JJA

DATE HEARD: 12 NOVEMBER 1990

DATE DELIVERED: 29 NOVEMBER 1990

J U D G M E N T

NESTADT, JA:

The issue in this appeal is whether respondent ("Patel"), a former employee of appellant ("Nampak"), is entitled to payment of eight days' salary in lieu of

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leave which had accrued to him prior to the termination of his employment on 31 December 1987. He was actually entitled to 39 days leave. Nampak, however, paid him for 31 of those days. This left in dispute whether he was entitled to payment for the balance of eight days. Patel sued Nampak in a magistrate's court for the amount involved, viz R657,76. Nampak defended the action. Its evidence was that the leave in question had by agreement between the parties, been granted to and taken by Patel. This occurred on 21-24 and 28-31 December 1987. Patel did not dispute that he had not worked on these eight days. He averred, however, that they did not constitute leave. His case was that, having earlier given notice of termination of his services and having during the first part of December been absent from work because of illness, he was on or about 15 December told not to return to work. The trial court

accepted Nampak's version and accordingly dismissed Patel's claim. Patel successfully appealed to the Natal Provincial Division. PAGE J (with whom BOOYSEN J concurred) found that Patel had established that he had neither agreed to nor taken any leave as alleged by Nampak. In any event, so it was further held, the taking of such leave was prohibited by sec 12(2)(b) of the Basic Conditions of Employment Act, 3 of 1983 ("the Act"). (The issue of its applicability had not been raised in the pleadings but was referred to without objection in argument in the magistrate's court.) Judgment was therefore entered in favour of Patel as claimed. This appeal, by Nampak, is against such order. It is brought with the leave of the court a quo.

Before us, Mr Koen on behalf of Nampak, did not pursue the contention that Patel had agreed to take leave. Counsel's argument rested on Nampak's further

evidence that its policy was to close down its factory each year during the second half of December; all employees, including Patel, were then obliged to and did take leave during this period; this is what happened in December 1987; the eight days in question, when Patel admittedly did not work, were therefore leave.

Logically, the first issue that arises is whether, in these circumstances, and in view of Nampak's instruction to Patel not to return to work, any part of the period that Patel thereafter absented himself, is properly to be regarded as leave. The following evidence of Patel is of significance in support of a negative answer:

"Yes, now when you were informed that you were not to come back to work, did you anticipate that you were then effectively on leave so to speak? --- No, I did not go back to work because they didn't want me on the premises."

I shall assume, however, that the eight days were intended by Nampak to constitute leave. The question that then arises, and on which this appeal turns, is whether sec 12(2)(b) applied. Based on the argument referred to, it was contended that it did not and that the court a quo erred in holding that the grant of the leave in question was prohibited. The relevant part of sec 12 provides:

"12. Annual leave. - (1)(a) An employer shall grant -

(i) an outside sales assistant, a traveller, a traveller's assistant, a demonstrator-salesman, a property salesman, an insurance agent, a guard or a security guard, at least 21 consecutive days'; and

(ii) any other employee, at least 14 consecutive days',

leave of absence on full pay in respect of each period of 12 consecutive months for which the employee is employed by him ---

(2) The leave referred to in subsection (1)(a) -

(b) shall not be granted by the

employer to be concurrent ---
with a period of notice of
termination of a contract of
service ---"

It was common cause that the Act (which repealed the Shops and Offices Act, 75 of 1964 and certain sections of the Factories, Machinery and Building Work Act, 22 of 1941) governed the contract between the parties and that Patel, as an employee falling under sub-sec (ii) of sec 12(1)(a), was entitled to at least 14 consecutive days annual leave. Nor was it in dispute that the effect of the section (the successor to sec 6(1)(c) of Act 75 of 1964) is to prohibit leave which offends its terms and that as a consequence such prohibited leave does not qualify as leave. It was, however, submitted that sec 12(2)(b) did not apply. I understood one contention to be that the section only applied to the full period of the annual leave to which an employee was entitled; here only a portion (ie eight

days) was in issue. This is untenable. The greater includes the lesser. The prohibition is against the grant of any annual leave in the circumstances postulated. Another argument was that Patel's leave had not been granted to be concurrent with his period of notice; this was because (so it was said) the compulsory period of leave had been granted to Patel prior to his giving notice of termination of his employment. This argument too must be rejected. As the court a quo found, the evidence did not establish that Patel was granted any (compulsory period of) leave before 30 November 1987 (which was the date of his notice). On Nampak's own evidence, the question of him taking leave only arose after he had handed in his notice.

Nampak's main argument was, however, that it

was exempt from the provisions of sec 12(2)(b). It relied on an exemption promulgated in terms of sec 34 of the Act under government notice 2420 as published in Government Gazette 9482 of 2 November 1984. The notice exempts "employers who cease their activities or part thereof annually for the purpose of annual leave for the period in respect of which an employee is entitled to annual leave with full pay in terms of the Act, or for the longer period that may be granted to him as leave with full pay, from the provisions of" inter alia sec 12(2). There follows certain provisos. Those which are relevant read:

" (a) ---

(b) the period of cessation of activities,
--- be extended by one working day with full pay for each public holiday which falls within such period and which otherwise would have been an ordinary working day for the employee;

(c) an employee who at the commencement of the period of cessation of activities has completed 12 consecutive months' employment with the employer, be paid his full remuneration in respect of the said period on the last working day of the employee before the cessation of activities, or, at the written request of the employee, not later than the first pay day for the employee after the expiration of the period of cessation of activities or, in the case of an employee referred to in paragraph (a), after the expiration of his leave;"

Counsel's submission was that Nampak had, pursuant to its aforestated policy of closing down over the Christmas period, ceased its activities for the purpose of annual leave for the period stated and that it therefore fell within the terms of the exemption.

A similar argument was rejected by PAGE J and in my opinion rightly so. Consider the terms of the body of the exception. It postulates two requirements. There must have been (i) a cessation of the employer's activities (or part thereof) for a particular period and

(ii) such cessation must have been for a particular purpose, namely, an employee's annual leave. This means, I think, that the cessation must be of the employer's activities involving that part of its business in which the employee whose leave is in issue worked. Patel worked in the administrative department (as a senior accounts clerk). And as already indicated, he was entitled to at least 14 consecutive days annual leave. So there had to be a cessation of the activities of the administrative department for this period. And such cessation had to be for the purposes of granting him annual leave. Since we are dealing with an exemption, the onus was on Nampak to establish this. I am not satisfied that it did. I do not propose to canvass the evidence in any detail. That of Patel (which is uncontradicted in this regard) explains how at the end of each year (his employment

began in 1980) he was "called back" to work for a number of days. He testified:

"The entire admin department is called back, we have debtors we have creditors. Yes that may be but you get called back, you are on leave and they've asked you to come back? --- Yes, I'm on leave and they do call me back... Invariably each year it is not leave as such for me because I know that I'm on stand-by... The factory was shut down, not admin... Basically in the seven years that I had worked there, I could not take annual leave as such, you know, for the full two weeks... I was always told you cannot be off in that period, we need you, who will get the management accounts out, who would attend to the banking, we need you. We need other members... No, I don't understand, when we say shut-down period, it is not a total shut-down... We had wages to work, we still had to send debtors statements out, we had something like five or six hundred customers we had to close their statements. The accounting function still carried on, there was never a holiday for the accounting function, and more in particular we had management accounts we had to do, we had to do a fifteen to twenty page management report."

It would seem, therefore, that the activities of the accounts department never in fact ceased for the

requisite period or purpose. Employees in that department were on standby. Despite the policy earlier referred to, they were obliged to return and did return from their "leave" to perform certain essential tasks. This was the position in 1987 as well (though obviously not as far as Patel himself was concerned).

There is perhaps an even more basic reason why the exemption does not apply. It arises from the operation of certain of the provisos. It can be shortly stated. As indicated, Nampak's activities must have ceased for at least 14 days. It was submitted on its behalf that the cessation was from 18 to 31 December 1987. That might mean that 17 December was the last working day. Even if it does, the period of cessation would be one day short. It is true that the period 18 December to 31 December (inclusive) comprises 14 days. However, para (b) of the proviso to the exemption (as

well as sec 12(2)(c) of the Act) requires the period of leave and therefore the period of cessation to be extended by one working day for each public holiday which falls within such period of cessation and which otherwise would have been an ordinary working day. Christmas day in 1987 fell on a Friday. The period of cessation therefore had to be for at least 15 days. It was not. Furthermore in terms of proviso (c) Patel must, in the absence of the request there referred to, have been paid on the last working day before the cessation of Nampak's activities. It would seem from Patel's evidence that he was paid on Friday 18 December. That was too late.

In summary, therefore, Nampak did not establish that the exemption relied on operated; sec 12(2)(b) applied; and whatever leave Patel had, did not count as such because it was prohibited. It follows

that Patel was entitled to judgment as claimed.

The appeal is dismissed with costs. Such costs are to include the costs of opposing the application for leave to appeal.

NESTADT, JA

VAN HEERDEN, JA)
STEYN, JA) CONCUR
F H GROSSKOPF, JA)
GOLDSTONE, JA)