

# ADVANCED LEAVE, A POSSIBLE SOLUTION TO THE PAYMENT OF SALARIED EMPLOYEES

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Every so often, the legal fraternity are faced with uncharted waters, so to speak. Legal concepts has to be tested in courts of law, new concepts thus has not been fully tested by the courts, or not tested at all. Many a time the occurrence of specific events sets in motion a duty on the legal fraternity to interpret aspects of the law which would be capable of assisting society in governing relations and disputes between the very members of this society.

From the onset it is important to note that the referred to legal concepts flows from existing legislation which legislation would from time to time allow further interpretation and in that creates legal concepts that the society can rely on. On 15 March 2020 and by virtue of a Declaration of a State of Disaster, South Africa became part of countries which would go down in the history books as a country also effected by the dreaded Coronavirus ("Covid-19"). Moreover, citizen, employees and employers alike will become known as fighters for society and the economy.

Employers in a run against time and in safeguarding their businesses and employees would seek options short of laying off or short – paying their employees. It is by virtue of this plight by employers that exploring of alternatives came to mind. A possible answer to employers' plights may lie in advancing to employees, leave, the employee, upon taking, are not yet entitled to. This concept in law, can be explained as advancement of leave. The legal implications thereof are more fully explained in the document to follow.

## A LEGAL FRAMEWORK – EXISTING LEGISLATION

### BASIC CONDITIONS OF EMPLOYMENT ACT, ACT NO. 75 OF 1997

The Basic Conditions of Employment Act ("BCEA") in Section 20<sup>[1]</sup> thereof discusses the entitlement to annual leave. An employee is entitled to 21 (TWENTY-ONE) consecutive days annual leave on full pay in every leave cycle<sup>[2]</sup>. Whatever the number of normal working days entails, the 21 (TWENTY-ONE) consecutive days will constitute the number of working days that the employee must be paid for.

It is important to note that annual leave is accrued, this meaning that the number of days to which the employee is entitled starts at 0 (ZERO) and increases with the passage of time as the leave cycle progresses. Annual leave may not be sold back to the employer, and the employer may not purchase annual leave days from an employee. The only circumstances under which the employer may pay the employee for annual leave due is upon termination of the employment contract for any reason, or upon the death or retirement of the employee.

By utilising this legislation as a basis, it is possible, by virtue of further research and interpretation to connect certain concepts in law to "new concepts" which may have the ability, to be relied upon in law. In the previous paragraphs to this article the concept of advancement of leave has been briefly mentioned. It further has been mentioned that in law, new concepts stand to be tested and interpreted. The referred to concept of advancement of leave is not specifically mentioned in a chapter of the relevant legislation dealing specifically with similar concepts. The aforementioned legislation being the Basic Conditions of Employment Act, as explained. Yet a similar concept to advancement of leave has been existing for an elongated time.

### THE LEGAL PRINCIPLES OF ADVANCING LEAVE IN COMPANY SHUT DOWN PERIODS ALSO APPLIED TO A "LEAVE ADVANCE - AGREEMENT" IN RESPECT OF COVID -19

As mentioned, it seems that the law is silent on the concept of "**Leave Advancement**" by an employer to an employee. This being where an employee does not have accrued leave which the employee may utilise in stead of working for time paid. The law has ventured on this concept in relation to **obliged leave in company shut down periods**, and it has been found that should an employee utilize his annual leave at another time during the year, then the shutdown period will be treated as unpaid leave, alternatively in situations where an employee has commenced employment with the employer late in the year and are therefore unable to accrue sufficient leave for the shutdown period, in such cases and should the employer advance leave, which was not yet owed to the employee, the employer in terms of law seems to not acquire the right to deduct the leave afforded under circumstances where the employee did not have a right thereto. It is seen that an employee did not "take the leave" but rather that the employer consented to the employee taking paid leave.

There seems to be an exception to the rule above in circumstances where the employer agreed to allow the employee paid leave, which had not yet accrued to the employee and has entered into an "Additional" - Agreement in respect whereof the employee undertakes to "repay" the employer for the leave granted should he/she resign from the employment before having accrued sufficient annual leave days to cover up the "Advanced Leave."

## A WORD OF CAUTION

Employers must be careful to ensure that whenever they permit an employee to do something, or to receive a benefit whereby the position may arise where the employee “owes” the employer something, then a proper written agreement should be entered into to provide for the reimbursement by the employee to the employer for whatever must be repaid.

The concept of payment of leave before it has accrued were tested in **Minnie and Another v Smart Plan CC[3]** at paragraph 19 where it was found that in principle, a term of a contract of employment that requires an employer to pay remuneration for a period of annual leave in circumstances where that remuneration is not paid as and when annual leave accrues **but in advance** of it being taken, does not contravene section 21[4] of the BCEA. In this case the employees leave formed part of their annual package and were paid in advanced monthly along with their salaries. In effect the same principle can be applied to employers affording employees leave which they are not yet entitled to.

The employer however in relation to advanced leave would have to be protected under law to be able to claim said advanced leave back. On occurrence of an event such as an employee leaving the employ of the employer, or being terminated before the advancement of leave has been worked back, in such case the employer may safeguard loss by virtue of Section 34 of the Basic Conditions of Employment Act.

## SALARY DEDUCTIONS ALLOWED UNDER SECTION 34 OF BCEA COMPARED TO CONTRACTUAL REMEDIES

Of importance to take into consideration with regard to an agreement to repay leave advanced, is the implications of Section 34[5] of the BCEA. The BCEA is clear that deductions may only be made in certain circumstances. In **Jonker v Wireless Payment Systems CC[6]** the employee had erroneously been paid a car allowance for a period of several months. The employer then sought to deduct the overpayment from her last two salary payments in the situation where she was being retrenched. She approached the Labour Court for an order requiring the employer to repay an amount that had already been deducted and preventing the employer from deducting in the future. She based her case on the provisions of s 34 of the BCEA which states that - *“(1) An employer may not make any deduction from an employee’s remuneration unless – (a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in agreement; or (b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.”* The Court refused to grant the order on the basis that the employee had not established urgency, but it also considered whether the employee had a right to prevent such deductions. It concluded that this was not the case. It appears to have relied on the provisions of s 34 (1)(b) and an earlier decision of the Labour Court in **Papier & Others v Minister of Safety and Security & Others[7]** where the same conclusion was reached.

A cautionary note which may be considered and borne in mind is that although employers may find this decision comforting, the risks should be considered as well, and more so on the apparent reliance by the Court on section 34(1)(b) of the BCEA which is at least arguably misplaced. There appears to be no law, collective agreement, court order or award which authorized the deduction in this case. Reference is made to Section 34(5) of the BCEA which states, *inter alia*, that an employer may not require or permit an employee to repay any remuneration except for an overpayment previously made by the employer resulting from an error in calculating the employee’s remuneration. It provides for an exception in the situation where there has been an overpayment as a result of an erroneous calculation. It permits a repayment in this case but does not necessarily authorize a deduction.

Possible further relief may lie in contractual law. Whereas a party wishing to rely on a contract entered into, such as for instance the advance annual leave agreement, would be able to approach a civil court on the terms and conditions of the agreement, and would on the basis of the breach thereof, be able to claim specific performance.

## CONCLUSION

In conclusion and although an employer and employee may not contract outside the law, unless it is to the benefit of the employee, it can thus be argued that an employer may advance leave not yet accrued to the benefit of an employee, to such employee on the premise of governing its rights to claim back the advanced leave so allowed. This being by virtue of an agreement stipulating that the “monetary value” of the leave advanced should be paid back by the employee to the employer.

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[1] 20. (1) In this Chapter, “annual leave cycle” means the period of 12 months’ employment with the same employer immediately following— (a) (b) (2) An (a) (b) (c) an employee’s commencement of employment; or the completion of that employee’s prior leave cycle. employer must grant an employee at least— 21 consecutive days’ annual leave on full remuneration in respect of each annual leave cycle; or by agreement, one day of annual leave on full remuneration for every 17 days on which the employee worked or was entitled to be paid; by agreement, one hour of annual leave on full remuneration for every 17 hours on which the employee worked or was entitled to be paid. (3) An employee is entitled to take leave accumulated in an annual leave cycle in terms of subsection (2) on consecutive days. (4) An employer must grant annual leave not later than six months after the end of the annual leave cycle. (5) An employer may not require or permit an employee to take annual leave during— (a) any other period of leave to which the employee is entitled in terms of this Chapter; or (b) any period of notice of termination of employment. (6) Despite subsection (5), an employer must permit an employee, at the employee’s written request, to take leave during a period of unpaid leave. (7) An employer may reduce an employee’s entitlement to annual leave by the number of days of occasional leave on full remuneration granted to the employee at the employee’s request in

that leave cycle. (8) An employer must grant an employee an additional day of paid leave if a public holiday falls on a day during an employee's annual leave on which the employee would ordinarily have worked. (9) An employer may not require or permit an employee to work for the employer during any period of annual leave. (10) Annual leave must be taken—(a) in accordance with an agreement between the employer and employee; or (b) if there is no agreement in terms of paragraph (a), at a time determined by the employer in accordance with this section. (11) An employer may not pay an employee instead of granting paid leave in terms of this section except—(a) on termination of employment; and (b) in accordance with section 40(b) and (c).

[2] a "leave cycle" means a period of 12 months commencing from the first day of employment or commencing from the end of the previous leave cycle

[3] D14/07; D15/07 [2009] ZALC 148; [2010] 4 BLLR 439 (LC); (2010) 31 ILJ 675 (LC) (3 June 2009)

[4] Pay for annual leave 21. (1) An employer must pay an employee leave pay at least equivalent to the remuneration that the employee would have received for working for a period equal to the period of annual leave, calculated—(a) at the employee's rate of remuneration immediately before the beginning of the period of annual leave; and (b) in accordance with section 35. 5 10 15 ~o 25 30 35 40 45 50 24 No. 18491 GOVERNMENT GAZETTE, 5 DECEMBER 1997 Act No. 75.1997 B\ \SIC CONDITIONS OF EMPLOYh4ENT ACT. 1997 (2) An employer must pay an employee leave pay—(a) before the beginning of the period of leave; or (b) by agreement, on the employee's usual pay day.

[5] Deductions and other acts concerning remuneration 34. (1) An employer may not make any deduction from an employee's remuneration 15 unless—(a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or (b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award. Z) (2) A deduction in terms of subsection (1)(a) may be made to reimburse an employer for loss or damage only if—(Q) (b) (c) (d) the loss or damage occurred in the course of employment and was due to the fault of the employee; the employer has followed a fair procedure and has given the employee a 25 reasonable opportunity to show why the deductions should not be made; the total amount of the debt does not exceed the actual amount of the loss or damage; and the total deductions from the employee's remuneration in terms of this subsection do not exceed one-quarter of the employee's remuneration in 30 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 an employee's remuneration in terms of subsection (1) for payment to another person must pay the amount to the person in 35 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 the (a) repay any remuneration except for overpayments previously made b- the employer resulting from an error in calculating the employee's remuneration; 40 or (b) acknowledge receipt of an amount greater than the remuneration actually received

[6] (2010) 31 ILJ 381 (LC)

[7] [2001] JOL 8001 Contemporary Labour Law Vol 20 No 3 October 2010 Page 25 (LC)