THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable/Not Reportable

LAC Case no: JA 101/2023

In the matter between:

JULIA LE GRANGE	**Appellant**
and	
DR GERHARDUS B VISSER **T/A SKUKUZA MEDICAL PRACTICE**	**First Respondent**
KRUGER PARK DOCTORS INC	**Second Respondent**

Heard: **27 August 2024**

Delivered: **18 November 2024**

Coram: **Van Niekerk JA, Musi and Sutherland AJJA**

JUDGMENT

MUSI, AJA

<u>Introduction</u>

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[1] This is an appeal against an order of the Labour Court in which it found that the appellant, Dr Le Grange, had not been dismissed by the first respondent, Dr Visser, and, consequently, dismissed her unfair dismissal claim. The appeal is with the leave of the court *a quo*. Dr Visser brought a conditional counter appeal to the effect that if this Court finds that Dr Le Grange had been dismissed, and we are inclined to award her compensation, we should limit the amount consonant with his offer of three month's salary, made with prejudice, in terms of Rule 22A of the now repealed Labour Court Rules.[1]

Facts

[2] Dr Le Grange was employed by Dr Visser on 7 April 2016, at the Skukuza Medical Practice (practice) at Skukuza in the Kruger National Park. Dr Visser operated the practice, since 2016, in terms of a contractual arrangement with the South African National Parks (SANPARKS) since the practice was located in the Kruger National Park. During October 2020, SANPARKS extended the contract until 31 March 2021.

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[1] Rule 22A provided as follows:
'Offer of settlement
(1) If a sum of money or the performance of some act is claimed in any proceedings, any party against whom the claim is made may at any time make an offer, in writing, to settle the claim or to perform the act.
(2) Notice of any offer in terms of this rule must be signed by the party who makes it and delivered to all other parties to the proceedings. The notice must state –
(a) whether it is unconditional or without prejudice as an offer of settlement;
(b) whether it is accompanied by an offer to pay all or only part of the costs of the party to whom the offer is made;
(c) whether the offer is made by way of settlement of both claim and costs or of the claim only; or
(d) whether the other party disclaims liability for the payment of costs or part of the costs, in which case the reasons must be given.
(3) An applicant may accept any offer made in terms of subrule (2) by delivering a notice of acceptance of the offer. The notice must be delivered within 10 days after the receipt of the offer, or thereafter with the written consent of the other party or in terms of an order of court.
(4) In the event of a failure to pay or to perform within 5 days after delivery of the notice of acceptance of the offer, the party entitled to payment or performance may, on 5 days written notice to the party who has failed to pay or perform, apply for judgment in accordance with the offer, and for the costs of the application.
(5) If an offer accepted in terms of this rule is not stated to be in satisfaction of an applicant's claim and costs, the party to whom the offer is made may apply to the court, on 5 days' written notice to the other party, for an order for costs.
(6) An offer made in terms of this rule is not a secret offer or tender and may be disclosed to the court at any time.
(7) An offer may be taken into account by the court in making an order for costs.'

[3] In October 2020, SANPARKS invited prospective bidders to submit bids for the running of the medical practice for a period of five years, commencing on 1 April 2021. The bidders had to be BBBEE level 2 compliant. The bid was for a two medical practitioners practice.

[4] Dr Le Grange, through Kruger Park Medics (Pty) Ltd, a company of which she was the sole shareholder, and Dr Visser, through the Second Respondent, Kruger Park Doctors, responded to the invitation and submitted separate bids. They knew about each other's bids.

[5] On 1 March 2021, Dr Visser gave all staff employed by the medical practice, including the Applicant, a notice of termination of their services with effect from 31 March 2021. The notice reads as follows:

> 'Termination of employment contract
>
> Dear Julia Dabrowski[2]
>
> My contract with the National Park expires on 31 March 2021 and will not be renewed, due to a tender process put in place. I have applied for this tender under a new company name, and whilst confident that this tender will be successful, certain legal processes now need to be followed.
>
> This communication is to inform you that due to the above I have to terminate the employment contract that exists between myself, Dr G.B. Visser, and yourself, subject to a notice period of one month.
>
> This notice period shall commence on 1 March 2021.
>
> You will receive your final remuneration payment by 31 March 2021.
>
> SIGNED AT SKUKUZA ON THIS 1st day OF MARCH 2021.
>
> Yours sincerely,
>
> Dr G.B. Visser'

[6] Dr Visser advised the employees that his contract with SANPARKS would expire on 31 March 2021. He further informed them that he had applied for the tender under a new company, the second respondent, and was confident the

[2] Dabrowski is Dr Le Grange's married name.

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contract would be awarded to it. The contemplation was that all the employees would be employed by the second respondent.

[7] Dr Le Grange had applied for two weeks leave from 1 April 2021 to 18 April 2021 and Dr Visser had employed locums from 1 April 2021. On 1 April 2021, the former wrote a message via WhatsApp to the latter requesting him to confirm that her employment status is still in accordance with the letter of 1 March 2021. He responded thus:

> 'Hi Jules
>
> I wanted to meet with you yesterday to discuss this, though it got too busy and we never got around to it.
>
> I will be negotiating new contracts with all staff going forward, and will lock down most everyone in the next week or so – I was hoping to also keep you on board.
>
> Due to SANPARKS' transformation mandate, and as set out in the conditions of the tender document, your position in Skukuza cannot continue, as the new doctor will commence working here late in April. I would propose having you manage the Kinross branch of the company, in order to keep you employed. This will commence beginning of May, as soon as the new doctor starts in Skukuza.
>
> I have also arranged locum cover for the first two weeks of April as you indicated you will be on leave until the 18th of the month.
>
> Let me know your thoughts – happy to discuss.'

[8] By 1 April 2021, SANPARKS had not yet awarded the new tender to anyone and Dr Visser was granted an extension to continue operating the practice until the end of May 2021.

[9] Dr Le Grange referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) on 15 April 2021. Conciliation failed, and she instituted an unfair dismissal claim, based on the employer's operational requirements, in the court *a quo*.

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[10] Dr Visser testified that he registered the second respondent, Kruger Park Doctors, a Personal Liability Company, with the intent to use it as a vehicle with which to tender for the practice. He was going to allocate 51% of its shares to a Dr Mthombeni in order for it to qualify as a BBBEE level 2 entity. In anticipation of this entity being awarded the tender, he decided to terminate the contracts of all his employees with the intention of re-employing them as employees of the new entity. The tender was not awarded to the new entity and some of the employees continued working for him until the end of May 2021 when he ceased operations. He denied re-employing all the other employees except Dr Le Grange, as she alleged.

[11] Dr Le Grange testified that after the termination letter dated 1 March 2021, she did not discuss her employment status with Dr Visser, save for the WhatsApp which she wrote on 1 April 2021. Dr Visser informed all the employees on 1 March 2021 that the termination letter was just a technicality, and that their jobs were safe. He further informed them that he had, verbally, been informed that the tender was awarded to the new entity and that he was awaiting the paperwork.

[12] She further testified that she got the impression that Dr Visser wanted to get rid of her, since he had re-employed all the other employees, on 1 April 2021. She had not been offered re-employment. She confirmed that she had cancelled her leave, although she was uncertain when she had done so.

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[13] The Labour Court was of the view that it did not have jurisdiction to determine the claim because Dr Le Grange did not prove that she had been dismissed. It *mero motu* requested the parties to address it on this point. After hearing the parties, the Labour Court found that when Dr Le Grange referred the dispute to the CCMA on 15 April 2021 there was no dismissal and that the referral was therefore premature. It concluded that it did not have jurisdiction to adjudicate the claim and consequently dismissed it. Aggrieved by the Labour Court's order, Dr Le Grange successfully applied for leave to appeal.

<u>In this Court</u>

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[13] Before us, Dr Le Grange argued that the Labour Court erred in finding that the referral was premature. She relied on s 191(2A) of the Labour Relations Act[3] (Act) which provides that an employee whose contract of employment is terminated by notice, may refer the dispute to the council or the CCMA once the employee has received that notice. She urged us to find that there had been a dismissal and consequently, the Labour Court had jurisdiction. Dr Visser argued that the Labour Court did not err in finding that it did not have jurisdiction because Dr Le Grange did not prove that she was dismissed.

Evaluation

[14] The issues that were submitted for determination to the court *a quo* were captured as follows in the pre-trial minute:

> '(i) Whether the dismissal of the applicant was procedurally and substantively fair.
> (ii) Whether the First Respondent complied with the provisions of s189 of the LRA.
> (iii) Whether the First Respondent should have re-employed the Applicant on 1 April 2021 along with the other employees.
> (iv) Whether the Applicant is due any further amount of money for leave pay…'

[15] Is it permissible for a court to posture a case to its liking and decide it on that basis, when the postured case has not been presented to it for adjudication by the parties? Courts should decide controversies submitted to it by the parties. They should generally resist the impulse to decide issues not submitted to them. There are exceptions to this rule, based on the court's duty. In the exercise of its duty, the Court does not act as a passive instrumentality that ensures that the rules of the game are observed, it ensures that justice is done.[4]

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[3] Act 66 of 1995, as amended.
[4] *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* [2013] ZASCA 150; 2014 (3) SA 96 (SCA) at para 20; *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC) at para 44; *Naude and Another v Fraser* [1998] ZASCA 56; 1998 (4) SA 539 (SCA) at 558B-C.

[16] A court may therefore *mero motu* raise a point of law provided that it is covered by the pleadings and its consideration would not involve unfairness, and causes no prejudice to the party against whom it is directed and raises no new factual issues. When a court raises a point of law it should give the parties an opportunity to deal with the issue.[5]

[17] The court *a quo* impermissibly took an admitted fact (dismissal) and fashioned it as a disputed fact in order to decide an issue not submitted to it for adjudication: jurisdiction. This matter was and is not about jurisdiction. I now consider what the court *a quo* ought to have considered.

[18] Since Dr Visser had opportunistically taken the jurisdiction point, I start by determining whether there was a dismissal. Section 190(2)(d) provides that, if an employer terminates an employee's employment on notice, the date of dismissal is the date on which the notice expires or, if it is an earlier date, the date on which the employee is paid all outstanding salary. It is common cause that the notice in this case expired on 31 March 2021. On 1 April 2021, when Dr Le Grange enquired about her status, the dismissal had already been effective.

[19] Dr Visser admitted that he terminated the employment of all the employees with the intention to have them employed by the second respondent. On his own version, there was a proper termination with the intention to 're-employ' if the second respondent secured the contract. The entire issue about the two weeks' leave is, at best, a red herring. There was a dismissal and the referral was made 15 days thereafter. The referral was therefore not premature.

[20] It is common cause that no process in terms of section 189 was followed. It is further common cause that after the notice was issued to Dr Le Grange on 1 March 2021, there had been no further communication, engagement or consultation about her employment. The belated attempt by Dr Visser to offer her alternative

[5] *CUSA v Tao Ying Metal Industries and others* [2008] ZACC 15; 2009 (2) SA 204 (CC) para 68.

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employment is of no moment because she was already dismissed and he could not unilaterally undismiss her. The dismissal was procedurally unfair.

[21] It is undisputed that Dr Visser's contract with SANPARKS was terminated on 31 March 2021 and that he was given a concession to run it until the end of April 2021. The dismissal had been for reasons of the employer's operational requirements. The dismissal was therefore substantively fair.

[22] The counterclaim is premised on the proposition that Dr Le Grange was unemployed for three months and is therefore only entitled to compensation equal to three month's salary. This proposition is fallacious.

[23] The proposition is based on a misunderstanding of the difference between patrimonial damages and a *solatium*. In *Johnson & Johnson (Pty) Ltd v CWIU*[6], this court explained it as follows:

> 'The compensation for the wrong in failing to give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a *solatium* for the loss of the right, and is punitive to the extent that an employer (who breached the right) must pay a fixed penalty for causing that loss. In the normal course a legal wrong done by one person to another deserves some form of redress. The party who committed the wrong is usually not allowed to benefit from external factors which might have ameliorated the wrong in some way or another. So too, in this instance.'

[24] Dr Visser totally disregarded Dr Le Grange's rights. She had to endure the indignity of unemployment whilst the other employees returned to work, albeit for a short period. Compensation equal to three month's salary is wholly inadequate.

[25] I therefore make the following order:

Order

1. The appeal is upheld with no order as to costs.

[6] [1998] 12 BLLR 1209 (LAC) at para 41.

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2. The counterclaim is dismissed with no order as to costs.
3. The order of the court *a quo* is set aside and replaced by the following:

‘1. The plaintiff’s dismissal was substantively fair but procedurally unfair.

2. The respondent is ordered to pay the plaintiff compensation equal to six month’s salary.

3. There is no order as to costs.’

CJ Musi AJA

Van Niekerk JA *et* Sutherland AJA concur.

APPEARANCES:

For the Appellant: S Sachs

Instructed by Bagraim Sachs Inc

For the Third Respondent: Z Schoeman

Instructed by Findlay & Niemayer Attorneys

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