REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 306/2012

In the matter between:

CHRIS DAVIDSON Applicant

And

EMVEST ASSET MANAGEMENT (PTY) LTD Respondent

Heard: **25 and 26 April 2013**

Delivered: **28 May 2013**

Summary: **Claim for salary and leave in terms of section 77(1) of the Basic Conditions of Employment Act 75 of 1997.**

JUDGMENT

PRINSLOO, AJ

Introduction

[1] The Applicant, Chris Davidson, approached this Court for a relief in terms of the provisions of section 77(1) of the Basic Conditions of Employment Act[1] (BCEA). His claim is for outstanding remuneration and accrued leave.

---

[1] 75 of 1997.

[2] The Respondent opposed the matter and relied on the provisions of section 34(1)(b) of the BCEA, claiming that section 34(1)(b) permits deductions if the deduction is required or permitted in terms of a law. The Respondent stated that it is obligated in terms of the Income Tax Act to deduct and claim outstanding taxes due and payable from the Applicant's outstanding remuneration and to pay it over to the South African Revenue Services (SARS).

[3] Before turning to the merits of the case, it is necessary to give a brief overview of the Applicant's employmentwiththe Respondent.

<u>Background</u>

[4] The Applicant commenced employment with EMVEST Agricultural Corporation (Pty) Ltd in October 2008 and he was paid remuneration as agreed between the parties. In 2009 the Applicant's cost to company was split between EMVEST Agricultural Corporation (Pty) Ltd, a South African company and EMVEST Agricultural Corporation (Mauritius) Limited, a Mauritian company. As from June 2009 the monthly remuneration paid to the Applicant by EMVEST Agricultural Corporation (Pty) Ltd was reduced in accordance with his agreement with the Mauritian company. The Mauritian company paid the Applicant his agreed remuneration.

[5] In October 2010 EMVEST Agricultural Corporation (Pty) Ltd engaged in a process of restructuring and as from November 2010 the Applicant was employed by EMVEST Asset Management (Pty) Ltd, the Respondent before this Court.

[6] It is the Applicant's case that he had two separate employers with two separate contracts of employment, one with the Respondent in South Africa and the other with EMVEST Agricultural Corporation (Mauritius) Limited, his Mauritian employer.

[7] The Applicant resigned on 9 January 2012 and he is claiming payment of his salary for the period 1 – 9 January 2012 and accrued leave of 19.5 days.

<u>The Applicant's claim and the Respondent's defence:</u>

[8] The Applicant's statement of case sets out his claim as follows:

[8.1] The Applicant was employed as a corporate director of the Respondent;

[8.2] He resigned on 9 January 2012;

[8.3] He was not paid any remuneration for the days 1 – 9 January 2012;

[8.4] He was not paid for any accrued leave amounting to 19.5 days;

[8.5] The Applicant claims R 17 775, 87 in respect of outstanding and unpaid remuneration and R 63 248, 73 in respect of accrued leave. His total claim is for R 81 024, 60.

[9] The Respondent opposes the claim and its defence as it appears from the statement of defence is as follows:

[9.1] The Applicant was remunerated in South Africa as well as Mauritius and he was paid €97 944, 82 for a period from July 2009 until 1 September 2011 in respect of his Mauritian remuneration;

[9.2] No tax was deducted from the Applicant's remuneration paid in Mauritius;

[9.3] The Income Tax Act provides that income earned in Mauritius by a person who resides in South Africa shall be taxed in South Africa if that was not taxed in Mauritius;

[9.4] The Applicant is liable for taxes on the €97 944.82 he earned in Mauritius and the Respondent is liable to deduct these taxes from the Applicant's remuneration;

[9.5] The Respondent is liable to pay SARS an amount of R 500 000 in respect of the Applicant's 'pay as you earn' (PAYE); and

[9.6] Section 34(1) (b) of the BCEA permits deductions if the deduction is permitted in terms of a law.

[10] It is common cause between the parties that the Applicant was employed by the Respondent as corporate director and that he has resigned from the Respondent's employ on 9 January 2012. It is further common cause that the Applicant was not paid for outstanding remuneration and accrued leave. It is however disputed that the Respondent is liable to pay the amounts claimed by the Applicant.

[11] This Court has to decide whether the Applicant is entitled to and the Respondent liable for payment of R 17 775, 87 in respect of outstanding and unpaid remuneration and R 63 248, 73 in respect of accrued leave.

<u>The evidence adduced</u>

[12] The Applicant testified that he was employed as corporate director and he was responsible for the management of assets. He explained that the Respondent has agricultural assets in a number of countries, including Zambia, Zimbabwe and Swaziland.

[13] The Applicant testified that he had two employers namely the Respondent and EMVEST Agricultural Corporation (Mauritius) Limited. He has been employed by EMVEST Agricultural Corporation (Mauritius) Limited since June 2009 and by the Respondent since November 2010. The remuneration paid to the Applicant was approximately R 70 000 per month paid by the Respondent and 8 000 USD paid by the Mauritian company.

[14] Both employers paid him a monthly remuneration and no issue was ever raised about that.

[15] He was not paid his salary for September until December 2011 and 1 – 9 January 2012 by EMVEST Agricultural Corporation (Mauritius) Limited and he instituted legal proceedings in Mauritius for the payment of his arrear salary. The Mauritian Court ruled in favour of the Applicant and EMVEST Agricultural Corporation (Mauritius) Limited paid him his arrear salary in September 2012. According to the Applicant, the claim he lodged in Mauritius is separate and not related to the claim this Court is called to adjudicate upon, because the Mauritian claim was for salary payable by a Mauritian entity in respect of a separate contract of employment.

[16] In respect of his leave entitlement the Applicant testified that he had a global number of leave days, namely two days per month with a total of 24 days per year. The 24 days per year were for both employers and if he had taken leave his credit would be reduced in respect of both employers. His leave days did not amount to 24 days per year per employer. The Applicant testified that he had 19,5 days leave credit and he was claiming payment for those days in accordance with the value of his salary in South Africa.

[17] The Respondent is withholding payment of the Applicant's salary for 1 – 9 January 2012 and his 19,5 leave day credit because it views itself liable to pay SARS in terms of the Income Tax Act and is therefore entitled to deduct outstanding taxes from the Applicant's salary. The Respondent, in its response to the Applicant's statement of case stated that no tax was deducted from the Applicant's remuneration paid to him in Mauritius and the income he so earned in Mauritius, shall be taxed in South Africa if it was not taxed in Mauritius.

[18] The Applicant presented an "ITA34" document he received from SARS, wherein SARS referred to the Applicant's income tax returns he submitted for 2012 and informed him that his assessment had been concluded and reflects that an amount of R 17 166,12 was refundable to him. It is the Applicant's case that he does not owe SARS money and this is supported by the "ITA34" document dated 25 January 2013.

[19] The Applicant called Ms Robyn-Marie de Kock as an expert witness. She testified regarding the Applicant's tax residency status and his tax obligations in South Africa. According to her testimony the Applicant is a non South African tax resident and thus not liable to pay tax in South Africa on income earned from Mauritius in respect of services rendered to a non South African company. The 'Double Taxation Agreement' between South Africa and Mauritius does not apply to non South African tax residents.

[20] Ms de Kock testified that the Applicant is not a tax resident in South Africa and he is therefore only liable to pay tax on income generated from a South African source. The Applicant received a tax clearance from SARS in January 2013, which is indicative of the fact that he does not owe tax to SARS.

[21] Ms de Kock testified that even if she was wrong and even if the Applicant was indeed a tax resident in South Africa and has to pay tax accordingly, the Respondent is not legally entitled to deduct tax from the Applicant in respect of income paid to the Applicant by an employer that is not resident in South Africa. The Mauritian company and the Respondent are different and separate legal entities and the Respondent cannot deduct tax in respect of income paid by the Mauritian company. She made it clear that if the Applicant was indeed a tax resident in South Africa, the payment of tax in respect of income earned in Mauritius, would be an issue between the Applicant and SARS and the Respondent has no liability whatsoever to deduct tax on the income paid by the Mauritian company. The Applicant will be liable in his personal capacity and it is his responsibility to declare the income and pay the tax to SARS.

[22] Ms de Kock made it clear that the Respondent was liable to deduct PAYE from the remuneration it paid to the Applicant. A South African employer company is responsible to deduct tax for services rendered and payments made in South Africa. Payments not made by the South African company cannot become the responsibility of the South African company – the responsibility rests with the individual.

[23] Ms de Kock denied that the Respondent has any basis to withhold payment to the Applicant as it has no liability in respect of tax on income that was paid by a different entity outside South Africa.

[24] The Respondent called Mr Daniel Francois le Roux as its only witness. Mr le Roux is the Respondent’s Human Capital Manager since November 2008. He confirmed that in June 2009 the Applicant was given a contract with the Mauritian company and after June 2009 the monthly amount paid to the Applicant as remuneration from the South African employer’s side, was reduced. He confirmed that the Applicant had two different employment contracts.

[25] Mr le Roux conceded that the Applicant’s claim for leave credit of 19.5 days was correct and that the calculation was indeed done by the Respondent and he did not dispute the amount claimed by the Applicant as R 63 248, 73.

[26] Mr le Roux agreed that the Respondent and Mauritian company were two separate entities and that the one entity would not have *locus standi* to claim payments on behalf of the other. Mr le Roux conceded that he did not know of any legal basis to withhold payment of outstanding salary and accrued leave to the Applicant. Section 34(1)(b) of the BCEA does not apply.

[27] Mr le Roux confirmed that the Respondent has paid PAYE in respect of the Applicant to SARS and that SARS has not made any further demands for the payment of tax. The Respondent has to deduct and pay PAYE over to SARS only in respect of income earned in South Africa, all other income is the individual's duty to disclose to SARS. Mr le Roux could not explain why the Respondent was assuming responsibility to deduct and pay tax to SARS in respect of money paid to the Applicant by a different entity in Mauritius.

[28] In respect of Mr le Roux, I make the following comment: he was an honest witness, placed in an extremely difficult position to defend a case and to testify on behalf of his employer when the defence put up by the Respondent was almost not defensible at all.

<u>The arguments:</u>

[29] In argument Mr Matyolo for the Applicant submitted that the Applicant's case has been unassailed, the amounts claimed were not disputed and the Applicant was able to show that the amounts he claims are indeed owed and there is no basis for withholding payment. Once the Applicant has proved his claim, the onus shifted to the Respondent to provide a defence. The defence put up by the Respondent is that it is entitled to withhold payment on the basis of the provisions of sections 34(1)(b) of the BCEA and the Income Tax Act. The Respondent could not show that the Applicant owed tax and the defence put up cannot succeed. The Respondent's conduct is an abuse as it is withholding payment for no good reason. The Applicant seeks punitive costs, including the cost of counsel and the expert.

[30] Ms van der Walt for the Respondent submitted that the Applicant was a full time employee of the Respondent and that this Court has to find that the Applicant was such full time employee of the Respondent. Ms van der Walt submitted that it is trite that a person could be a full time employee of only one

employer. She submitted that the Mauritian contract was disputed and that it was not possible that the Applicant was an employee of the Mauritian company.

[31] I cannot agree with the submission that a person could be a full time employee of only one employer. In *Footwear Trading CC v Mdlalose*[2]the Labour Appeal Court accepted that it was possible for an employee to have more than one employer.

<u>The issues to be decided:</u>

[32] This Court has to decide two main issues. Firstly whether the Applicant is entitled to payment of R 17 775,87 in respect of outstanding and unpaid remuneration and R 63 248,73 in respect of accrued leave. Secondly whether the Respondent is liable to pay the amounts claimed or whether Respondent's defence should succeed as reason for not paying the Applicant.

[33] It is common cause between the parties that the Respondent employed the Applicant as corporate director since 2010 and that he has resigned from the Respondent's employ on 9 January 2012. It is further common cause that the Applicant was not paid for outstanding remuneration and accrued leave upon his resignation.

[34] The Respondent accepted that the 19.5 days leave credit claimed by the Applicant is correct. The Respondent further accepted the amounts as calculated and claimed by the Applicant in respect of nine days remuneration and 19.5 days leave credit as correct.

[35] The Applicant was employed by the Respondent and upon his resignation, he is entitled to be paid *pro rata* remuneration and accrued leave. The Respondent did not dispute this and I cannot but find that the Applicant is entitled to payment of R 17 775,87 in respect of outstanding and unpaid remuneration and R 63 248,73in respect of accrued leave.

[36] The Applicant was also employed by a Mauritian entity and he instituted civil proceedings in a Mauritian Court for payment of outstanding salary. His claim was successful and it is not related to the claim he instituted in this Court.

---

[2][2005] 26 ILJ 443 (LAC).

[37] The second question to be considered is whether the Respondent is liable to pay the amounts claimed or whether Respondent's defence should succeed as reason for not paying the Applicant.

[38] The only defence put forward by the Respondent for not paying the Applicant is that the Applicant earned income in Mauritius and was liable to pay tax on the income so earned in South Africa in accordance with the Income Tax Act. No tax was deducted and hence the Respondent is liable to deduct these taxes from the Applicant's remuneration. Section 34(1)(b) of the BCEA permits deductions if the deduction is required or permitted in terms of a law. The Respondent is obliged in terms of the Income Tax Act to deduct and claim the outstanding taxes from the Applicant's salary and to pay it over to SARS.

[39] Section 34(1) of the BCEA reads as follows:

> Deductions and other acts concerning remuneration
>
> (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 the agreement; or
>
> (b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.

[40] The Respondent's case is that it is entitled to withhold the Applicant's money because it is obliged in terms of the Income Tax Act to deduct and claim the outstanding taxes from the Applicant's salary and to pay it over to SARS.

[41] <u>The evidence before this Court was:</u>

[40.1] That the Respondent was liable to deduct PAYE in respect of remuneration paid to the Applicant for services he rendered in South Africa and that was indeed done;

[40.2] The Respondent was not liable for tax or PAYE in respect of income paid to the Applicant by a Mauritian entity for services rendered to that entity;

[40.3] The Applicant received a tax clearance from SARS and there is no indication on that document that he owes taxes to SARS;

[40.4] SARS has not made any demand that the Respondent has to deduct and claim outstanding taxed and pay such taxes over to SARS;

[40.5] If there is a tax liability and money owed to SARS in respect of money earned in Mauritius, it is an issue between the Applicant and SARS;

[40.6] The Respondent has no liability to pay tax and has no obligation towards SARS in respect of income it did not pay the Applicant.

[42] The Respondent has not showed this Court the provision of the Income Tax Act that requires or permits the Respondent to deduct money from the Applicant's remuneration in respect of outstanding taxes on income paid to him by a Mauritian entity.

[43] The Respondent spent much time and effort during trial to establish that the Applicant was indeed a South African tax resident for purposes of paying tax to SARS. It is not for this Court to determine the Applicant's status as tax resident. However, the evidence of Ms de Kock was that even if the Applicant was a indeed tax resident, the payment of tax in respect of income earned in Mauritius, would be an issue between the Applicant and SARS and the Respondent has no liability whatsoever to deduct tax on the income paid by the Mauritian company.

[44] Mr le Roux could also not tender any explanation why the Respondent is accepting liability to deduct outstanding taxes on income not paid by the Respondent.

[45] The Respondent did not present any evidence to show that the Applicant indeed owed taxes to SARS. The Applicant on the other hand submitted a recent tax clearance obtained from SARS, showing the contrary.

[46] This defence put forward by the Respondent cannot be sustained.

[47] I therefore find that the Respondent is liable to pay the Applicant R 17 775,87 in respect of outstanding and unpaid remuneration and R 63 248,73 in respect of accrued leave.

Costs

[48] Mr Matyolo on behalf of the Applicant is seeking punitive costs, including the cost of counsel and the expert. He submitted that the Respondent could not show any basis for withholding the Applicant's remuneration and where a litigant causes the other party to lose in circumstances where it was frivolous and vexatious, a punitive cost order would be appropriate.

[49] Ms van der Walt submitted that the Respondent was not frivolous and vexatious in opposing the matter and that the Applicant should not be awarded costs on a punitive scale. She further submitted that if the Court finds that the Applicant is to be remunerated double, taking into consideration the payments made in Mauritius, each party has to pay its own costs. If the Respondent does not have to pay the tax to SARS, it has to pay the Applicant and then cost should follow the cause.

[50] I have to state that the finding that the Respondent is liable to pay the Applicant outstanding remuneration and accrued leave, is not a finding that he should be remunerated double. What the Applicant claimed in Mauritius and what he was awarded there, was in terms of his employment contract with the Mauritian company and has nothing to do with his claim in respect of his South African employment.

[51] Costs should be considered against the provisions of section 162 of the Labour Relations Act[3] and according to the requirements of the law and fairness. The requirement of law has been interpreted to mean that the costs would follow the result.

[52] In considering fairness, this Court has held that the conduct of the parties should be taken into account and that *mala fide*, unreasonableness and frivolousness are factors justifying the imposition of a costs order. Another factor to be considered is whether there is an ongoing relationship that would survive after the dispute had been resolved by the Court. If so, a costs order may damage the ongoing relationship.

[53] The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having

[3] 66 of 1995

been unjustly compelled to initiate or defend litigation. In considering whether costs should be awarded, the requirements of law and fairness become applicable.

[54] In *Wallis v Thorpe and another*[4] the Court held:

> 'In relation to costs, this court has a discretion in terms of s 162 to make an order for costs according to the requirements of the law and fairness. The ordinary rule, ie that costs follow the result, is a factor to be taken into account, but it is not a determinative factor. Mr.*Rossouw* submitted that costs should be awarded on a punitive scale, since the litigation initiated by the applicant was nothing less than frivolous. While there is some merit to Mr*Rossouw's* submission having regard particularly to the casual and careless attitude with which the applicant has conducted these proceedings since their inception, I intend to make an order for costs only on the ordinary scale. This litigation was ill-considered from the start…'
>
> …Ultimately, the applicant is the author of his own misfortune. This court encounters many indigent and illiterate litigants who seek to enforce what they perceive to be their rights. The court is often wary of the effect of a costs order on persons such as these, who more often than not sincerely but misguidedly institute ill-conceived proceedings. The applicant in these proceedings is neither indigent, nor is he illiterate. On the contrary, he is an articulate, experienced business person, who was quite capable of considering the consequences of his decision…'

[55] In *Gois t/a Shakespeare's Pub v Van Zyland others*[5] it was held that

> 'Furthermore, this court may make a punitive cost order such as costs on an attorney and client scale where it believes it appropriate to do so. Factors to consider whether or not to grant such punitive costs orders include where the conduct of the party -
>
> *(a)* is vexatious and amounts to an abuse of the legal process, even though there is no intention to be vexatious;
>
> *(b)* evinces a lack of *bona fides*;
>
> *(c)* is reckless, malicious and unreasonable…'

[56] It is evident that the Respondent's defence is without any merit, it is frivolous, vexatious and the Respondent has not approached this Court in good faith.

---

[4] [2010] 31 ILJ 1254 (LC)

[5] [2011] (1) SA 148 (LC);(2003) 24 ILJ 2302 (LC) at para 43.

The Respondent adduced no evidence to support its defence. Instead by refusing to pay the Applicant his outstanding remuneration and accrued leave without good reason, the Respondent compelled the Applicant to approach this Court and opposing this matter is nothing but a gross abuse of process. This Court has to discourage ill-conceived litigation, especially where the Respondent had failed to establish even a factual basis for its defence.

[57] The Respondent was legally represented and was to be advised of the consequences of defending litigation in a court of law and the risk of losing and paying costs. In fact, after the first day of the trial, I encouraged the parties to reconsider their positions and to attempt to settle the matter. The Respondent however was adamant to proceed with the trial.

[58] The Applicant had to institute civil proceedings and had to proceed to trial in a case where the reason for not paying and the defence put forward was doubtful from the onset and fairness dictates that the Applicant cannot be expected to endure enormous costs instituting litigation that ought not to have been brought in the first place.

[59] I further consider the fact that there is no ongoing relationship between the parties.It would be just and equitable if the Respondent is ordered to pay the costs and that on a punitive scale.

[60] In the premises I make the following order:

<u>Order</u>

1. The Respondent is to pay the Applicant R 17 775,87 in respect of outstanding and unpaid remuneration;
2. The Respondent is to pay the Applicant R 63 248,73 in respect of accrued leave.
3. The Respondent is to pay the costs, including the costs of the expert;
4. Cost to be paid on an attorney and client scale.

Prinsloo, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Adv X D Matyolo

Instructed by Perrot Van Niekerk Woodhouse Matyolo Inc Attorneys

For the Respondent: Adv.Van der Walt

Instructed by OJ Le Roux Attorneys