



Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS 600/03

In the matter between:

SOLIDARITY

STEWART, EM

ENSLIN, EM

and

LANDMAN JM DR

HEYMAN, JF

DU PREEZ JG DR

TRUSTEES FOR THE TIME BEING

OF THE MALELE TRUST

FIRST APPLICANT

SECOND APPLICANT

THIRD APPLICANT

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

FOURTH

RESPONDENT

Trial: 7 December 2015

Judgment delivered: 8 December 2015

JUDGMENT

VAN NIEKERK J

- [1] The second and third applicants (collectively, the employees) were employed by Dr Fourie, a medical practitioner in Nigel; the second applicant since 1985 and the third since 1991. In November 1998, Fourie sold his practice to the first respondent, Dr Landman. On 14 February 2002, Landman concluded an agreement with the fourth respondent in terms of which the practice was sold to the fourth respondent as going concern. Landman subsequently appointed a locum, Dr Venemans, to work in the practice. Landman was resident in the Western Cape and after Venemans' appointment was rarely seen, if at all, at the practice. There is a dispute about the identity of the employees' employer after the transfer and the role of the second respondent, who was the practice's auditor, but this was of no consequence to the employees in their day-to-day work. The employees performed the same work and were paid their remuneration from an account held by Landman and described as 't/a Dr BH Venemans praktyk rekening'.
- [2] Matters changed dramatically on 29 Friday November 2002, when the employees heard rumours that the practice had been sold. They sought advice and were told that in the absence of any notice of termination of their re-employment, they should report at work as usual. On Monday 2 December 2002, the employees reported for work and tendered their services. They were informed that the

practice had been sold to the third respondent, Dr du Preez. Du Preez informed them that he had brought in his own staff and that he had no need of their services. It is not disputed that Du Preez continued to practice from the same premises, took transfer of the telephone lines, employed two of the employees' colleagues (the pharmacist and the cleaner), saw patients who had appointments with the practice on the day and that he retained the patient files for at least two days before handing them over to the employees and Venemans, at the latter's request.

- [3] Unable to get hold of Landman, Venemans and the employees decided to continue the Landman practice from Venemans' home. They retrieved the patient files from Du Preez, and telephoned patients to advise them that Venemans was continuing the practice at a different address. The employees were paid a salary from the same source at the end of December 2002 and January 2003 respectively. Venemans did not draw a salary during this period. The practice was not sustainable. At the end of January 2003, Venemans received and accepted an offer of alternative employment and the practice closed.
- [4] The applicant's claim is one of unfair dismissal for a reason that is automatically unfair, and in the alternative, a dismissal that is substantively and procedurally unfair. The basis of any substantive or procedural unfairness is not apparent from the pleadings, but the primary claim is one in terms of s 187 (1) (g), i.e. a dismissal on account of a transfer or a reason related to a transfer in terms of s 197.
- [5] At the close of the plaintiff's case, Mr West, who appeared for the first respondent, applied for absolution from the instance. He did so on the basis that on the primary case pleaded and the evidence given by the employees, there was a transfer of the business (comprising the practice) as a going concern to Du Preez with effect from December 2002, and that any right of recourse that the applicants had was against the new employer for the purposes of s 197, Du Preez. As an aside, after the court's ruling on November 2015 on the point in *limine* raised on Du Preez's behalf, the applicants reached a settlement with him. The applicants had previously obtained a judgment against Heymans.

- [6] Mr Goosen, who appeared for the applicants, did not dispute that in the event that it was found that there had been a transfer of a business as a going concern for the purposes of s 197, any right of recourse lay only against Du Preez.
- [7] Also relevant to the application for absolution are the issues of the existence of a dismissal and the date of the referral of the employees' dispute to the CCMA. Mr. West submitted that the evidence did not disclose the existence of a dismissal by Landman, and that to the extent that the employees' testified that their contracts of employment had been terminated at the end of January 2003, the referral to the CCMA on 30 December 2002 was premature and thus fatally defective. Although issues such as these, which are jurisdictional issues, ought to be raised in terms of procedures designed to determine matters that are finally dispositive of a case, I can see no reason why they should not be raised in an application for absolution if only because they are necessary elements of a *prima facie* case.
- [8] In Erasmus *Superior Court Practice*, 2nd ed. D1-530, the test for absolution is expressed in the following terms:
- When absolution from the instance is sought ... at the close of the plaintiff's case, the test to be applied is not whether the evidence established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, or ought to) find for the plaintiff.
- [9] I deal first with the submissions regarding the existence of a dismissal. It is incumbent on an applicant in any claim for unfair dismissal first to establish the existence of a dismissal, a matter in respect of which the applicant bears the onus (see s 192(2)).
- [10] The employees gave no clear evidence as to whether they had been dismissed, when and by whom. The third applicant in particular gave conflicting versions as to when she was dismissed and by whom, stating at once that she had been unfairly dismissed by Landman and/or Du Preez in December 2002 and then by Landman

in January 2003. Neither employee led any cogent evidence to establish that she was dismissed by Landman. On the contrary, the evidence of both was that they and Venemans had attempted without success to locate Landman after the events of 2 December. He was never located – by the time that Du Preez took occupation of the premises from which the practice had been conducted and by the time that what might be described as the ‘Landman practice’ ceased at the end of January 2003, Landman had apparently relocated to the United Kingdom.

- [11] A ‘dismissal’ is defined by s 186 (1) (a) to mean a ‘termination of employment’ by an employer. This requires the employer to engage in an act which brings employment to an end in a manner valid in law (see *National Union of leatherworkers v Barnard & another* [2001] 22 ILJ 2290 (LAC)). An applicant in an unfair dismissal claim must establish, on a balance of probabilities, ‘some overt act by the employer that is the proximate cause of the termination of employment’ (see *Ouwerhand v Hout Bay Fishing Industries* (2004) 25 ILJ 731 (LC)). Neither employee, as I have indicated, adduced any evidence to suggest that she was dismissed by Landman in December 2002, or January 2003, or at all.
- [12] Mr. Goosen submitted that in essence, Landman had repudiated the contract of employment and that the employees’ acceptance of that repudiation brought the contract to an end, thus constituting a ‘dismissal’ for the purposes of the LRA. The difficulty with that proposition, of course, its correctness aside, is that the employees’ referral to the CCMA was made on 30 December 2002, prior to the date of dismissal. That is fatal to the applicants’ claim (see *Avgold – Target Division v CCMA & others* [2010] 2 BLLR 159 (LC)).
- [13] Since the applicants have failed to adduce evidence that they were in fact dismissed by Landman, there is no basis on which a court could establish that the employees had been dismissed within the meaning of that term as defined by s 186 (1) (a), and accordingly, there is no basis on which a court, applying its mind to the evidence, could find for the applicants. For these reasons, I am satisfied that the first respondent is entitled to absolution from the instance.

- [14] In these circumstances, it is not necessary for me to make any finding on whether there was a transfer of a business as a going concern for the purposes of a claim of unfair dismissal that is automatically unfair because it is related to the transfer. I do find it incongruous though that the applicants plead that the business was so transferred to Du Preez for the purposes of a claim against him but as against Landman, the applicants seek to deny that contention.
- [15] Of course, my finding on the jurisdictional point of the existence of a dismissal has the consequence that in so far as the applicant rely on the alternative claim of an 'ordinary' unfair dismissal claim against Landman, the question of the exercise of a discretion to remit the matter or hear it as arbitrator (see s 158 (2)) does not arise.
- [16] Finally, in so far as costs is concerned, the court has a broad discretion to make an order for costs according to the requirements of the law and fairness. In my view, the interests of both are satisfied by an order that each party should bear its own costs. The employees were obviously genuinely aggrieved at the shameful manner in which their employment came to an end after years of service. They pursued that grievance and sought remedies against the parties whom they considered responsible for their plight. This court is traditionally reluctant to close its doors to employees in these circumstances by applying the rule that costs ought to follow the result. In any event, the first respondent's statement of response suggests that the first respondent had no dealings with or involvement in the practice after February 2002, and that the employees' dismissal was not due to any act or omission on his part. In these circumstances, the first respondent ought to have raised a special plea to the effect that as against him, there was no dismissal for the purposes of s 187. Had he done so, this matter may well have been more expeditiously determined.

I make the following order:

1. The first respondent is granted absolution from the instance.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the applicants: Adv C Goosen instructed by Serfontein Viljoen & Swart

For the first respondent: Adv H west, instructed by Nichole Landman Attorneys