THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 483/09

In the matter between:

DR B M RAWLINS **Appellant**

and

DR D C KEMP t/a CENTRALMED **Respondent**

Neutral citation:	*Rawlins v Kemp* (483/09) [2010] ZASCA 102 (7 SEPTEMBER 2010)
Coram:	NAVSA, NUGENT, SNYDERS and MHLANTLA JJA and BERTELSMANN AJA
Heard:	**26 AUGUST 2010**
Delivered:	**7 SEPTEMBER 2010**
Summary:	Labour Relations Act of 1995 – unfair dismissal – refusal to order payment of compensation.

ORDER

On appeal from: Labour Appeal Court (Zondo, JP and Willis and Waglay JJA sitting in the court below):

The appeal is dismissed.

JUDGMENT

NUGENT JA (NAVSA, SNYDERS and MHLANTLA JJA and BERTELSMANN AJA concurring)

[1] There are troubling aspects of this case that go beyond the particular issues that it raises. The case arises from the dismissal of Dr Rawlins (the appellant) from the employment of Dr Kemp (the respondent). Soon after the dismissal occurred Dr Kemp accepted that it was unfair. What remained in dispute was only what remedy Dr Rawlins should have. Indeed, the dispute was even narrower than that, because Dr Kemp offered to reinstate Dr Rawlins on numerous occasions but on each occasion the offer was refused. Dr Rawlins said in evidence that she refused the offers because the relationship of trust had broken down. The dispute in the litigation that followed was confined to whether she should be awarded compensation and, if so, what amount that should be.

[2] Even before the litigation commenced Dr Rawlins found alternative employment at a higher salary than she had been paid by Dr Kemp and it was conceded by her counsel that the financial loss she

sustained in consequence of the dismissal did not exceed R40 000.[1] In a long line of cases courts have held that compensation for unfair dismissal is limited to financial loss (even then it need not compensate for that loss in full).[2]

[3] It is now more than twelve years since Dr Rawlins was dismissed and the case has passed through the hands of nine judges. It was decided by the Labour Court – albeit incorrectly – more than seven and a half years after the event. The order of the Labour Court was corrected by the Labour Appeal Court eleven years after the event. It is now before us one and a half years later. Yet the claim is of the kind that the mechanisms of the Labour Relations Act 66 of 1995 are designed to bring to expeditious finality.

[4] Briefly, the claim arose as follows. Dr Kemp is a medical practitioner in private practice in Bloemfontein. In 1997 he purchased a second practice – what he called a 'satellite' practice. With effect from 1 February 1997 he employed Dr Rawlins to run the satellite practice at a net salary of R10 000 per month. The satellite practice was financially separated from his own practice, it was conducted from separate premises, and Dr Rawlins was left to exercise her medical skills without interference.

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[1] Four months' remuneration.

[2] See the long line of cases under the Labour Relations Act 28 of 1956 of *Camdons Realty (Pty) Ltd v Hart* (1993) 14 ILJ 1008 (LAC) 1018F-1019D; *Alert Employment Personnel (Pty) Ltd v Leech* (1993) 14 ILJ 655 (LAC) 661E-G; *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 ILJ 974 (LAC) 981C-H; *Amalgamated Beverages Industries (Pty) Ltd v Jonker* (1993) 14 ILJ 1232 (LAC) 1256B-1257E; *SA Quilt Manufacturers (Pty) Ltd v Radebe* (1994) 15 ILJ 115 (LAC) 126C-127B; *Robecor v Durant* (1995) 16 ILJ 1519 (LAC) 1521I-1522H; *Chevron Engineering (Pty) Ltd v Nkambule* 2004 (3) SA 495 (SCA) para 31. That principle has since been endorsed by the Labour Appeal Court in relation to the Labour Relations Act of 1995: *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO* (2007) 28 ILJ 2238 (LAC) para 30.

[5] In about June 1997 Dr Rawlins informed Dr Kemp that she was pregnant. They agreed that she would take maternity leave for two months with effect from 1 February 1998. She would be paid for two weeks of her maternity leave and the balance would be taken as unpaid leave. Shortly before her leave commenced Dr Kemp suggested to Dr Rawlins that she should take the opportunity to look for alternative employment in view of the financial difficulty of the practice. According to Dr Kemp he hoped to find a more junior doctor who would be willing to run the satellite practice at a lower salary.

[6] Dr Rawlins took the suggestion to mean that she was being dismissed. She informed her husband who immediately telephoned Dr Kemp and demanded a letter advising Dr Rawlins that she had been dismissed. There was some acrimony between the parties at that time but the detail is not important. Suffice it to say that although Dr Kemp maintained that he had not intended to dismiss Dr Rawlins he nonetheless, unaccountably, furnished Dr Rawlins with a letter informing her that she was dismissed with effect from the end of February 1998 on account of the financial difficulties of the practice.

[7] Alleging that she had been dismissed on account of her pregnancy, Dr Rawlins referred the matter to the Commission for Conciliation, Mediation and Arbitration through the offices of her union, claiming compensation from Dr Kemp. Had she indeed been dismissed on account of her pregnancy the dismissal would have been ‘automatically unfair’ under s 187(1)(e) of the Labour Relations Act. The statutory maximum that may be awarded to an employee for an ‘automatically unfair’

dismissal is the equivalent of 24 months' remuneration.[3] Where a dismissal is otherwise unfair the statutory maximum is the equivalent of 12 months' remuneration.[4]

[8] Counsel for Dr Kemp told us frankly that we can accept that Dr Kemp behaved poorly towards Dr Rawlins at the time that he dismissed her and no doubt she was entitled to feel aggrieved. But within a month, on 12 March 1998, Dr Kemp acted sensibly when, on the advice of his attorney, he offered to reinstate Dr Rawlins, alternatively, to pay her one month's salary in lieu of notice, severance pay of one week's salary for each completed year of service, and unspecified compensation for the period 1 February 1998 to 12 March 1998. It was accepted by counsel for Dr Rawlins that the offer of reinstatement was made genuinely and in good faith. At first there was no response to the offer but it was repeated in the course of attempts at conciliation on 17 March 1998 and was summarily rejected.

[9] Conciliation failed to resolve the dispute and Dr Rawlins commenced proceedings in the Labour Court on 22 September 1998 in which she claimed a declaration that her dismissal had been 'automatically unfair' or, alternatively, a declaration that her dismissal had been otherwise unfair. She claimed in each case the maximum amount of compensation that the statute allows.

[10] By then Dr Rawlins had found and taken up alternative employment (with effect from 1 September 1998) at a higher salary than she had been paid by Dr Kemp (precisely what her new salary was does

[3] Section 194(3).
[4] Section 194(1).

not appear from the evidence). Her financial loss had thus been fixed by then at no more than four months' remuneration – amounting to R40 000 – though in truth it might even have been less. Before the matter came to trial Dr Kemp again offered to reinstate Dr Rawlins. Nonetheless, Dr Rawlins persisted in her claims.

[11] The Labour Court (Gush AJ) found that Dr Rawlins had not been dismissed on account of her pregnancy (a finding that she did not challenge in the subsequent appeal) but that her dismissal was nonetheless unfair (a finding that was not challenged by Dr Kemp). The learned judge went on to hold that her refusal of the offer of reinstatement had been reasonable and he awarded compensation of R120 000 (twelve months' remuneration), observing that 'the manner in which [Dr Kemp] went about dismissing [Dr Rawlins] and his timing is deserving of censure'. The basis upon which he made the award was a clear misdirection. I have already referred to the long line of cases that have held that a court's remedial powers are compensatory and not punitive and her loss amounted to no more than four months' remuneration.

[12] An appeal to the Labour Appeal Court[5] was confined to the questions whether Dr Rawlins should have been awarded compensation at all and, if so, whether the amount awarded was excessive.

[13] In separate judgments the majority (Zondo JP and Waglay JA) enquired into the nature of the discretion that is exercised by a court when it considers questions of compensation and the grounds upon which a court might interfere on appeal. We need not consider that question because counsel for the appellant accepted that the Labour Appeal Court

[5] Reported as *Kemp t/a Centralmed v Rawlins* (2009) 30 ILJ 2677 (LAC).

was at large to substitute its discretion for that of the Labour Court. His argument was confined to the correctness of its conclusion.

[14] The majority found that Dr Rawlins should not have been awarded compensation, while Willis JA was of the view that she should have been awarded compensation, but no more than six months' remuneration. The principal reason for the decision of the majority was that Dr Rawlins had unreasonably refused the offer of reinstatement. Zondo JP expressed that as follows:

'[Dr Kemp] may have treated [Dr Rawlins] the respondent unfairly when he dismissed her in the manner in which he did but he had "a right to seek to right the wrong" that he had committed by offering to put the respondent back in the position in which she would have been had she never been dismissed. It is what I call an employer's "right to right a wrong". And, if the offer was genuine and reasonable, as it has been conceded on behalf of [Dr Rawlins] it was, I cannot see why [Dr Kemp] must be ordered to pay her compensation which would not have arisen if the respondent had accepted the offer of reinstatement. In my view it is very important to affirm the employer's "right to right a wrong" that he or she has made in these kinds of circumstances. If an employer unfairly dismisses an employee and he wishes to reverse that decision, he must be able to do so, and if the employee fails to accept that offer for no valid reason, the employer has a strong case in support of an order denying the employee compensation.'[6]

[15] The difference between the Labour Court and the Labour Appeal Court was thus within a decidedly narrow compass – the Labour Court felt that the rejection of the offer of reinstatement was reasonable and the Labour Appeal Court felt that it was not. In each case the court concerned was called upon to make a value judgment on the same facts. And we are asked by the parties to do no more than to say whether we agree with the value judgment of the one court or the other.

[6] Para 26.

[16] It is questionable whether an appeal of that kind should be before us at all in view of the decision in *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd*[7] – though I hasten to add that the petition to this court might have cast the matter in a different light. In that case the test for special leave to be granted was expressed as follows:

'No doubt every appeal is of great importance to one or both parties, but this Court must be satisfied, notwithstanding that there has already been an appeal to a specialist tribunal, and that the public interest demands that labour disputes be resolved speedily, that the matter is objectively of such importance to the parties or the public that special leave should be granted. We emphasise that the fact that applicants have already enjoyed a full appeal before the LAC will normally weigh heavily against the grant of leave. And the demands of expedition in the labour field will add further weight to that.'[8]

[17] Now that the appeal is before us I mention that decision only to indicate that the principle upon which it is founded is that this court will not lightly interfere with the decisions of the specialist tribunal that has been established to hear appeals in labour disputes. That is consistent with the observation by the Constitutional Court in *Dudley v City of Cape Town*[9] that:

'[t]he LAC is a specialised appellate Court that functions in the area of labour law. Both the LAC and the Labour Court were established to administer labour legislation. They are charged with the responsibility for overseeing the ongoing interpretation and application of labour laws and the development of labour jurisprudence.'

[18] That applies particularly where the decision of the Labour Appeal Court is the product of a value judgment that is arrived at in its continuing

[7] 2005 (5) SA 433 (SCA).
[8] Para 43.
[9] 2005 (5) SA 429 (CC) para 9.

development of its own jurisprudence. Whatever view we might have taken on the matter it seems to me that we would be remiss if we were not to defer to that court's value judgment in a matter of this kind. In any event I agree with the conclusion of the majority. No doubt Dr Rawlins genuinely felt that there had been a breach of trust. But these are two professional people who might be expected to resolve any acrimony that might earlier have existed. No objective grounds were advanced why any perceived breach of trust between them was not capable of being restored. Dr Rawlins chose not even to explore that possibility but rejected it out of hand. That is not how labour relations should be conducted and I agree that the rejection of the repeated offers of reinstatement was unreasonable and she has only herself to blame for her financial loss.

[19] In heads of argument counsel for Dr Kemp asked for the costs of the appeal but generously did not press that claim in argument. I might only add that I think he cannot be faulted for having adopted that course.

[20] The appeal is dismissed.

R W NUGENT
JUDGE OF APPEAL

APPEARANCES:

For appellant:	P R Cronjé
	Instructed by: Phatshoane Henney Inc, Bloemfontein
For respondent:	S Snyman
	Instructed by: Snyman Attorneys, Johannesburg Honey Attorneys, Bloemfontein