IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J2192/00

In the matter between :

JOHN WILLIAM STRAUSS First Applicant

MICHAEL STEVENSON Second Applicant

and

PLESSEY (PTY) LIMITED Respondent

JUDGMENT

CORAM : A VAN NIEKERK AJ

Introduction

In *Johnson & Johnson (Pty) Ltd v CWIU* [1999] 12 BLLR 1209 (LAC), Froneman DJP observed that however wondrous and mysterious the ways of global capitalism may be for some, for others they bring only cold comfort. He noted too that however impersonal the vagaries of market forces, they have very human and often unfortunate consequences. This was certainly true for the applicants in this matter. They respectively had some five and thirteen years service with the respondent company, and each had survived a number of mergers, restructurings and rationalisations. But on 1 March 2000, they were handed letters terminating their employment because, it would seem, their positions had become redundant as a consequence of the new strategic direction in which the senior

management of the company had decided to embark. The applicants claim that their dismissals were unfair, and seek compensation in terms of s 194 of the Labour Relations Act, 66 of 1995.

<u>e ambit of the dispute</u>

Before he commenced leading evidence in this matter, the company's counsel, Mr Pauw SC, requested the Court to make a ruling in respect of the ambit of the dispute between the parties. In their statement of claim, the essence of the applicants' case is reflected in paragraphs 7.4, 7.5 and 7.6. These refer to the dispute in the following terms:

"7.4 The respondent did not engage in any form of consultations as envisaged by s 189 of the Act in that the First and Second applicants were never consulted on;

7.4.1 alternatives to the applicants' posts becoming redundant;

the possibility of the applicants occupying alternative posts within the respondent's business;

the means by which the applicants were selected as candidates for retrenchment;

the severance packages proposed;

the assistance to be given to the applicants by the respondent subsequent to retrenchment;

7.5 The applicants were not afforded the opportunity of making representation with respect to the impending retrenchments;

7.6 The respondent failed and/or refused to provide the applicants with written information concerning -

7.6.1 the reasons for the proposed retrenchments;

the alternatives that the respondent considered prior to imposing the retrenchments;

the selection criteria utilised;

the severance packages proposed, and the assistance that the respondent would provide to the retrenched individuals.

*7.7 The respondent has contravened s 187(1)(P) (*sic*) of the Labour Relations Act in that it is contended that the applicants were selected as candidates for retrenchment on account (*sic*) the applicants' ages as both applicants are nearing retirement age."*

In the same statement, at paragraph 8, the applicants defined the legal issues that arise from the facts on which they relied. The paragraph reads as follows:

> *"8. Legal issues that arise from the facts*
>
> *It is submitted that -*
>
> *8.1 The applicants were dismissed without due regard being had to the provisions of s 189 of the Act aforesaid in that the respondent did not attend to any of the criteria referred to in s 189 aforesaid, alternatively, the applicants were dismissed on account of an arbitrary basis on account of their ages."* (sic)

Two pre-trial conferences were held between the parties. The minute of the pre-trial conference held on 21 August 2000 records that the applicants would allege that there was no need in general to retrench, as the respondent had chosen not to accept certain tenders that were open for it to accept. In this regard, the applicants submitted that there was no financial rationale to effect the retrenchments. The applicants submitted further that they were highly trained and skilled operators who could have been utilised in certain tenders that had been presented for acceptance to the respondent. On the same basis, the applicants alleged that had the respondent been required to retrench individual employees, it should have selected employees who were less skilled and engaged in more junior positions. Finally, the applicants submitted that the respondent had at no time consulted properly in the "spirit of s 189 of the Act", and that at no time had their submissions been taken into consideration by the respondent.

A supplementary pre-trial minute was filed on 9 February 2001. The facts in dispute, as defined by the terms of that minute, include a contention by the applicants that "no adherence was paid to s 189 of the Act". In particular, it was recorded that the parties were in dispute as to whether the first and second applicants were consulted on:

(a) alternatives to their posts becoming redundant;

b) the possibility of their occupying alternative posts within the respondent's business;

c) the means by which they were selected as candidates for retrenchments;

d) the severance packages proposed; and

e) the assistance to be given to the applicants by the respondent subsequent to retrenchment.

In addition, the applicants alleged that the respondent acted in breach of s 187(1)(e) of the Act in that they were selected as candidates for retrenchment on account of their age.

Paragraph 15 of the supplementary minute records that the parties are in dispute as to whether or not there was a general need to retrench. The applicants again recorded that there were certain tenders available to the respondent, and that no financial rationale existed for their retrenchment. The respondent contended that it was suffering losses as against budget profit for the financial year, and that it faced a major reduction in turnover.

Mr Pauw referred the Court to the recently reported decision of the Labour Appeal Court in *Peach and Hatton Heritage (Pty) Ltd v Neethling & others* [2001] 5 BLLR 528 (LAC). In that matter, Joffe AJA, who wrote the judgment in which Zondo JP and Mogoeng JA concurred, stated the following:

"Generally speaking the function of a pre-trial conference is to limit issues and not widen them. In so far as first respondent contends in paragraph 5 that he persists in his claim that there was no commercial rationale for his retrenchment, such claim did not form part of his statement of case. Whilst it may have been the respondent's legal representative's intention to raise the substantive fairness of the dismissal of the respondents, it was not an issue on the statement of case. The assertion by the respondents' legal representative that the respondents persist in their claim that

there was no commercial rationale for his retrenchment in the pre-trial minutes, does not result in it being a triable issue. The pre-trial minute does not go far enough to evidence the existence of an agreement to widen the issues. … in considering that the reasons for the dismissal were not based on the appellant's operational requirements, the Court a quo widened the dispute between the parties. It was not entitled to do so." (At paragraphs [16] and [17].)

Mr Viljoen, who appeared for the applicants, conceded that the statement of claim filed on behalf of the applicants was not drafted in the most elegant terms, but he questioned whether the point raised by Mr Pauw was properly a point in limine, in a sense that it might be more appropriately addressed in regard to the admissibility of any evidence that might be tendered in the proceedings. In addition, he made reference to that part of the applicants' statement of case in which they seek an order *"declaring the retrenchment of both the First and Second applicants to constitute a substantively and unfair retrenchment, alternatively, to constitute a contravention of s 187 (1)(P) (*sic*) of the Labour Relations Act."* In the light of that prayer and the pre-trial minutes, Mr Viljoen contended that both the substantive and the procedural fairness of the applicants' retrenchments had properly been placed in issue.

I ruled that the issues properly before the Court were those referred to in the applicants' statement of case, and in particular:

a) an alleged failure by the respondent to engage in any form of consultation as required by s 189 of the Act in those respects referred to in clauses 7.4 and 7.5 of the statement of case;

b) the alleged failure by the respondents to provide the applicants with information in writing in those respects referred to in clause 7.6 of the statement of case; and

c) the alleged unfair selection of the individual applicants for retrenchment on account of their ages, or on some other arbitrary basis.

0] I do not intend to dwell on the reasons for the above ruling, save to say the following. First, a prayer for relief is not a sufficient basis on which to place an issue in dispute if that issue has not been the subject of any of the averments of either fact or law that the rules require to be incorporated in a statement of case. Secondly, to the extent that the minutes of the pre-trial conferences held by the parties purport to extend the ambit of the dispute to include the substantive fairness of the applicants' retrenchments, the terms of the minutes do not expressly comprise an agreement to widen the issues. The mere assertion by the applicants that they intended to persist with their claim that the retrenchment was substantively unfair, does not make that issue triable. (See generally *Peach & Hatton Heritage (Pty) Ltd v Neethling & others* (supra), and Landman & Van Niekerk *'Practice in the Labour Courts;* at D-28 and D-31.)

1] After the ruling was made, Mr Viljoen elected to continue the proceedings despite an offer by Mr Pauw to afford the applicants an opportunity to amend their statement of case. The matter then proceeded on the basis of a definition of the issues in the terms described above.

e facts

2] There is no fundamental dispute of fact between the parties. It is common cause that on 23 February 2000, a memorandum was sent to all members of the respondent's staff giving notice of what were termed possible retrenchments. The memorandum, signed by a Mr Shaun Liebenberg, the Managing Director, notes that the company had continued to make significant losses in certain areas as a consequence of fierce competition and the ongoing decline in new business. An analysis of the various structures and processes that form part of the company's business had revealed inefficiencies in certain areas and that in order to return the company to profitability, it would be necessary to restructure and rationalise certain functions. The memorandum specifically notes that

the proposed rationalisation may lead to job losses. The memorandum thereafter broadly follows the pattern of s 189 of the Act, and notifies employees of alternatives to retrenchment considered and/or implemented, the number of employees who may be affected by the retrenchment, the proposed selection criteria, the proposed timing of the retrenchment, the severance pay that the company intended to pay, post-employment assistance to retrenched employees, and a commitment to consider the re-employment of retrenched employees in the event of suitable vacancies in future.

3] In regard to the consultation process itself, the memorandum notes that consultation would be conducted, with the intention of reaching consensus, as soon as possible, to "minimise the effect of the retrenchment exercise." Employees were invited to consider voluntary retrenchment and were invited to make application to senior management in this regard.

4] The memorandum concluded by noting that a meeting would be held on Friday, 25 February 2000, in which the information addressed in the memorandum would be motivated and discussed. Each of the applicants received the memorandum by e-mail.

5] On Friday, 25 February 2000, the meeting foreshadowed by the memorandum took place. The minute of the meeting was produced in evidence, and there was no dispute as to its content. Initially, Strauss had raised concerns about a draft of the minute circulated to employees. His concerns related to statements that had been made concerning the lack of any new marketing initiatives, and Liebenberg's comments and replies to questions at the end of the meeting. Strauss' concerns were addressed, and the draft minute was rectified.

6] The minute records that the meeting was opened with an introduction by Liebenberg, who addressed the reasons for the proposed retrenchments. These included a year to date loss of approximately R3 000 000 (three million rands) against the year to date budget of a R13 000 000 (thirteen million

rands) profit. Competition had increased, and existing clients were revising their policies on engagements of sub-contractors. The minute records a consideration of alternatives to retrenchment in the form of a reduction of overheads, the termination of the creation of vacancies, various attempts to optimise current structures and the consideration of organisational requirements. Employees were advised that having regard to future business requirements, it was envisaged that approximately sixty (60) employees might be affected by the retrenchment exercise. Liebenberg noted that all business units would be affected, as would all job categories and levels within the organisation.

7] In regard to timing, Liebenberg noted that consultations with staff had commenced in the form of the meeting underway, and that consultations with affected individuals would be conducted with effect from 1 March 2000. It was anticipated that the consultation process would be completed by 15 April 2000. Further statements by Liebenberg incorporated proposals on severance pay, (the company proposed to pay the statutory minimum of one weeks remuneration for every completed year of service), selection criteria and the prospect of early retirement. In regard to selection criteria, the company noted that in addition to LIFO (subject to retention of skills) applied per department or business unit, it intended to take into account specific redundancies consequent on "the required structure."

8] Further statements extended to post employment assistance for employees selected for retrenchment, the re-employment of retrenched employees in the event of future suitable vacancies, and a specific invitation to submit any suggestions or alternatives to either Liebenberg or the Human Resources Manager, Ms Madelein Olivier, before close of business on Monday, 28 February 2000.

9] It is common cause that apart from the exchange of e-mails concerning the accuracy of the minutes, neither of the applicants responded to the invitation to make representations on any of the matters

raised during the meeting.

0] The evidence led by the respondent's witnesses, a Mr Viv du Plessis, to whom both of the applicants reported, and Ms Olivier, was that during the course of the next week, the selection criteria that had been proposed at the meeting on 25 February 2000 were applied by a team comprising the company's senior management, and that individual employees were selected for retrenchment by that team.

1] The next event of any significance, and it was to be an event of momentous significance for the individual applicants, occurred on 1 March 2000. Both applicants testified that they were called into Du Plessis' office where they were each presented with an envelope containing three documents. The first was a letter addressed to each of them dated 29 February 2000, the second a form acknowledging receipt of the letter, and the third a so-called retrenchment "check list".

2] The letter notified each of the individual applicants that they had been identified for retrenchment in terms of what were described as "agreed criteria which was consulted with all interested parties involved" (sic). The letter further advised each of the applicants that the same day, 1 March 2000, was to be their last working day, that they would not be required to work during their notice period, and that they would be paid in lieu of notice up to and including 31 March 2000, which it was recorded "is effectively the date of retrenchment". The letter thereafter addressed issues relating to severance pay, annual leave, medical and retirement benefits, return of assets and records, unemployment insurance provisions and the recovery of amounts owing to the Company. The letter concluded as follows:

"*Should you feel prejudiced in any way, you can lodge an appeal in writing to the undersigned within the notice period.*

*The company would like to take the opportunity to sincerely thank you for your support and effort that you have contributed to PLESSEY. Furthermore the company wishes you well and all the success for the future."(*sic*)*

The letter was signed by Olivier.

3] The acknowledgements of receipt of the letter assumed some significance during Mr Pauw's cross-examination of each of the applicants. The acknowledgement was drafted in the following terms:

"I, the undersigned, do hereby acknowledge receipt of a letter dated February 29, 2000 from "PLESSEY" concerned notice of my pending retrenchment."

4] It is not disputed that each of the individual applicants signed the acknowledgement on 1 March 2000, although there is some dispute as to how each of the parties interpreted the words "pending retrenchment." Mr Pauw suggested that the word 'pending' conveyed some connotation of a less than final decision to the notice of dismissal. The applicants testified that they considered the word to refer to the retrenchments already decided upon, but yet to be implemented.

5] Both applicants testified that they were shocked by the content of the letter. Neither applicant had anticipated that he would be retrenched. Given the nature and seniority of their positions, nothing that Liebenberg had said gave them any cause to be concerned that they might be selected for retrenchment.

6] Du Plessis then conducted separate discussions with each of the applicants. There is some dispute as to the duration of these discussions, but neither interview could have been conducted for more than approximately thirty minutes. Du Plessis testified that he discussed each of the items included in the "retrenchment check list" with each of the applicants. The checklist contains a number of

elements numbered from 1 to 12 dealing with the following:

- motivation;
- alternatives;
- number of employees;
- selection criteria;
- notice period;
- severance pay;
- post employment assistance;
- re-employment;
- medical aid;
- provident fund;
- return of assets; and
- final payment.

7] During the interview, and in respect of each of the above headings, the company's position was reasserted. These positions were no different from those contained in Liebenberg's initial memorandum, or those articulated by him in the meeting held on 25 February 2000. Each of the applicants was required to initial the document in respect of each of the elements that comprised the checklist. The checklist also made provision for comments by each of the applicants. It was apparent from the comments recorded by both the applicants that they were primarily concerned with the prospect of their being permitted to take early retirement, and with the timing of the payment of the various amounts payable to them consequent on their retrenchment.

8] Both applicants testified that Du Plessis had assured them at the meeting that he had done all that

was possible to secure their continued employment, but that he had been unsuccessful. The sense conveyed by the applicants was that Du Plessis had some sympathy with their cause, but that he had been unable to persuade senior management to reverse the decision to select them for retrenchment. This was not put to Du Plessis in cross-examination, but it is not so much Du Plessis' attitude rather than that of the applicants that was placed in issue. It was common cause that neither of the applicants raised any concerns about the substantive fairness of their termination of employment with Du Plessis, nor did they specifically address any shortcomings in the procedure that the company had adopted. When their apparent acquiescence was put to them in cross-examination, both applicants testified that they felt that there was no point in endeavouring to do more than secure for themselves the best possible financial settlement they could.

9] It is common cause that neither applicant availed himself of the right to appeal, and that neither took any steps during the notice period of 1-31 March 2001 to express his discontent with the company's decision or the manner in which it was implemented. The meetings that were held during the notice period between the applicants and the company concerned logistical and human resource management issues, all of which were dealt with by Olivier.

It is also common cause that apart from the meetings with Olivier, both applicants left the company's premises on 1 March, and that they were both unemployed for a period. Strauss testified that he was unemployed until September 2000, when he managed to secure alternative employment in Tanzania on a contract basis and on less favourable terms than those which regulated his employment with the company. Stevenson obtained employment on 1 January 2001 after having operated for a period as a consultant.

pplicable legal principles

0] At the outset, I should note that I did not understand Mr Viljoen to pursue the allegation that the applicants had been selected for retrenchment on account of their age, and that their retrenchment was unfair on this basis.

1] Mr Viljoen confined his attack to the consultation procedure adopted by the company. In essence, the dispute between the parties was narrowed to an allegation by the applicants that prior to their being handed notices of termination of employment on 1 March 2000, the company had failed to consult adequately with them. Mr Pauw submitted that there had been proper consultation prior to the applicants being notified of the termination of their employment. He relied primarily on the memorandum by Liebenberg, the general meetings and the meetings with Du Plessis in support of this submission. Whatever shortcomings in the procedure there may have been, Mr Pauw submitted that these were remedied both by the open invitation to the applicants to appeal against the company's decision, and to otherwise engage with the company on any concerns they may have had, or any discontent on their part.

2] While our law recognises no right to employment for life, the social balance struck in a context of a constitutional regime in which the right to fair labour practices is a fundamental right, is to afford an employee the right not to be unfairly dismissed and the employer the right to dismiss an employee for a fair reason provided that a fair procedure is followed. In the case of a dismissal for a reason related to an employer's operational requirements, the Code of Good Practice (see General Notice 1517 of 1999) acknowledges that retrenchment is a 'no-fault' dismissal. For this reason, and because of the human cost of retrenchment, the LRA imposes particular obligations on an employer, most of which are directed to ensuring that all positive alternatives to dismissal are explored, and that employees to be dismissed are treated fairly.

3] As I have noted above, the substantive fairness of the dismissal of the applicants is not in dispute, either in the form of the respondent's reasons for the retrenchment exercise on which it embarked, or the selection of the applicants for retrenchment. The crisp issue to be decided is whether the consultation process initiated by the respondent on 23 February 2000 complied with the obligations imposed on an employer by s 189.

4] Mr Pauw submitted that the first and second applicants had been consulted on all of the issues recorded in paragraph 7.4 of their statement of case, and to the extent that the applicants allege that they were "never consulted" on those issues, this is untrue. Although in a literal sense the applicants may have been consulted on alternatives to retrenchment selection criteria, severance pay and assistance post dismissal, this submission ignores the qualitative assessment of the consultation process which this Court is required to make.

5] The Labour Appeal Court has noted that a mechanical "check list" approach to determine compliance with s 189 is inappropriate. The proper approach is to ascertain whether the purpose of the section (the occurrence of a joint consensus seeking process) has been achieved. (See *Johnson and Johnson* (supra) at 1217A).

6] Reviewing the evidence, one develops the uncomfortable feeling that the consultation process in this instance was a carefully timed and orchestrated process. Although Olivier explained the references to elements of s 189 in both the memorandum distributed on 23 February and in the meeting on 25

February 2000 in terms of a concern to ensure that the company complied with all its legal obligations, the mechanical approach adopted by the Company is at odds with the true nature of consultation.

7] The inescapable conclusion is that the company simply went through the formal process of consultation without any intention of ever genuinely reaching agreement on the issues that it held out to be open for discussion.

8] The e-mail addressed to all employees on 23 February 2001 can hardly be described as an invitation to engage in joint consensus seeking. The proposed timing of the process, according to the e-mail, was such that the consultation process was intended to commence on 25 February 2000, and to conclude by 15 April 2000. The meeting on 25 February 2000 confirmed that consultations with individuals would commence from 1 March 2000, and that the process would be completed by 15 April 2000. Employees were invited to submit suggestions and alternatives for consideration by the company before 28 February 2001.

9] A general invitation to a group of employees to submit suggestions and alternatives on the company's proposals by the end of the next working day is hardly indicative of an intention to engage in joint consensus seeking with the group. The subsequent meeting behind closed doors to decide which employees were to be retrenched, and the fact that the applicants were thereafter presented with notices of termination of employment without any further warning or indication that their positions or their employment were at risk, is an approach consistent with what the Labour Appeal Court referred to in *Kotze's* case as the "desire to steam roll the retrenchment process", and irreconcilable with the obligation to engage in a process of meaningful consultation in the form that this is required.

0] For the purpose of determining whether or not the employer adopted a fair procedure in dismissing the applicants, the notice of a right to "appeal" against any aspect of the employer's decision, and the offer to continue to consult during the contractual notice period, must be viewed against what was clearly an unequivocal decision by senior management that the applicants were to be retrenched. The tone of the letter dated 28 February 2000 and handed to the applicants on 1 March 2000 is hardly tentative, indeed, they were wished the best in careers that they were clearly intended to pursue elsewhere.

1] The so-called discussion on the check list that formed the basis of the meeting with the applicants on 1 March 2000 presented simply another opportunity for members of the Company's management to reiterate the positions it had previously communicated to employees on 23 and 25 February 2000. The meeting between Du Plessis and each of the applicants did not disclose any intention by the company to seek consensus in the terms of the applicants' retrenchments.

2] In *Kotze v Rebel Discount Liquor Group (Pty) Ltd* [2000] 2 BLLR 138 (LAC) the Labour Appeal Court reaffirmed the rights of senior managerial employees to be fully consulted before being retrenched. The Court noted that implicit in the requirement of a free opportunity to make meaningful proposals in the consultation process is the duty to give employees reasonable notice of the proposed retrenchment. The Court stated:

"Such notice must allow them time and space to absorb the shock brought about by the daunting prospect of losing their job. As a general proposition, no employee can reasonably be expected to constructively and effectively engage the employee on such a serious matter from the very minute the bad news is broken to him or her. He or she must be afforded the opportunity to come to terms with the situation, to reflect on the matter, to seek guidance and prepare for consultation and then only can a fair and genuine consultation begin. What constitutes such reasonable time would depend on the circumstances of each case."

3] In the *Kotze* matter, it was submitted on behalf of the company that the affected employee had never complained to any of the members of management with whom he held meetings about the alleged unfairness of his retrenchment and that he had therefore acquiesced in the fairness of the process.

4] Mr Pauw made much of the applicants' failure to submit alternatives either in the general meeting held on 25 February 2000 or to Du Plessis on 1 March 2000. I accept the applicants' explanations that they had no expectation that their work security was in jeopardy, and that the letters of dismissal handed to them induced both a sense of shock and helplessness, with the consequence that their immediate concern was to procure the best possible financial outcome for themselves and their families. The Act makes it clear that the onus to establish the procedural fairness of a dismissal is on the employer. That onus is not discharged by the distribution of a general memorandum and a single meeting in which the content of the memorandum is reiterated and at which a general invitation to make representations within a period of a little more than a working day is issued. In these circumstances, the reticence by shell-shocked employees to engage with their employer cannot be held against them. This is not an instance such as that envisaged in *Johnson & Johnson* where it can be said fairly that the purpose of s 189 has been deliberately foiled or frustrated by either of the applicants.

5] Having elected to consult with individual employees on the reasons for retrenchment, alternatives to retrenchment, selection criteria, the proposed severance package, it was incumbent on the respondent to consult in good faith with the affected individuals, and with a view to seeking consensus with them on the retrenchment and the terms on which it was to be effected. In the present instance, the respondent presented the employees that it had selected for retrenchment with a fait accompli in the form of a notice of termination of employment, to take effect on the same day

as the consultation with the affected employees was initiated. The consultation procedure adopted by the Company in this instance was a more truncated process than that adopted by the employer in the *Kotze* case (supra) which, in the circumstances of that case, was held to be "a wrong and undesirable procedure".

6] The inescapable conclusion is that the respondent conducted the consultation process with unseemly haste, and that its conduct is irreconcilable with an intention to engage in a meaningful dialogue as required by the provisions of s 189.

The right to compensation

7] The applicants seek to be compensated for their unfair dismissal. A finding that a dismissal was procedurally unfair does not automatically entitle an employee to compensation. The Court has a discretion to award compensation. This is a discretion that must be exercised judicially (see *Johnson & Johnson* (supra). If compensation is granted, the employee is entitled to the equivalent of twelve (12) months remuneration, or the lesser amount of remuneration that would have been earned between the date of dismissal and the date of judgment, in the unlikely event of the matter being heard within the twelve month period after the date of dismissal. In this instance, the applicants were dismissed in March 2000. If they are entitled to be compensated, they are entitled to the equivalent of twelve months remuneration. The choice before the Court is therefore a stark one. The applicants are each to be awarded one years pay or nothing at all.

8] The factors to be taken into account in the exercise of a discretion to award compensation exclude actual patrimonial loss. (See *Johnson & Johnson* (supra)), and *Scribante v Avgold Limited (Hartebeesfontein Division)* (2000) 21 ILJ 1864 (LC). In *Scribante's* case, the following factors were

considered relevant:

(a) whether the employer has already provided the employee with substantially the same kind of redress;

b) whether the employer's ability and willingness to make that redress is frustrated by the conduct of the employee;

c) the degree that the employer deviated from the requirements of a fair procedure; and

(d) whether the employer secured alternative employment for the employee.

Scribante's case was decided in the context of an acknowledgement made by the employer that a retrenchment was procedurally unfair, and a tender to make unconditional payment to the retrenched employee of the amount to which he would have been entitled in terms of s 194(1), had the adjudication occurred on the day of the tender.

9] In *Alpha Plant and Services (Pty) Ltd v Simmonds & others* [2001] 3 BLLR 261 (LAC), the Labour Appeal Court regarded the extent of the deviation from the requirements of consultation and assistance laid down in the LRA as a relevant factor. In this instance, like that of *Alpha Plant*, there was no joint consensus seeking process. The extent of the company's deviation from the requirements of s 189 are not insignificant, and must be brought into account in determining any right to compensation.

0] The letter of 28 February 2000 addressed to each applicant did not address the information required

by s 189 (3). The information to which the applicants had access was limited to that furnished to them in the memorandum dated 23 February 2000 and that disclosed to them at the meeting dated 25 February 2000.

1] There are a number of other factors that are relevant. In *Alpha Plant*, the Court considered the employees' length of service as relevant and held:

"It seems to me that the intention of s 189 is to ensure that when retrenchment occurs employees are treated with real kindness, consideration and concern. Employment relationships give rise to a mutual duty of loyalty. The longer the relationship the greater the duty and of course, loyalty ought to result in treatment enthused with kindness, consideration and concern. It seems to me to follow that the shorter the employment relationship, the less the bond of loyalty. Thus a relatively short employment relationship renders the breach of s 189 less serious than it would otherwise have been."

2] It is common cause that Strauss and Stevenson were employed for some five and thirteen years respectively. These periods of service are not inconsiderable. In so far as the employer may have attempted to ameliorate the position of the applicants, there was some indication to them by Du Plessis that he had already secured the authorisation from management to offer consultancy agreements to them. Neither applicant was offered work on this basis after his retrenchment.

3] A factor weighing heavily in favour of the applicants is their proximity to the earliest age at which they would be entitled to retire from the Company's employ in terms of the Rules of the retirement fund of which they were members. Their primary concern during the course of their meeting with Du Plessis was to secure an agreement which in some form would enable them to remain employees until reaching the age of fifty five. Certainly in the case of Stevenson, the company declined to accede to this request.

4] The employer in this instance is not a small or medium enterprise. It is a joint venture to which one of South Africa's largest corporations, Dimension Data, is a party.

5] In so far as the employer's generosity in regard to severance pay is a relevant factor, it should be recalled that the employer in this instance confined the severance package that it both proposed and paid to the statutory minimum.

6] There are a number of factors that must be weighed in the Company's favour. These have been referred to in the context of a consideration of the fairness of the applicants' dismissal, but they warrant consideration in the context of the discretion to be exercised in regard to any obligation to pay compensation. The applicants were specifically invited to discuss the issues raised in the check list that formed the subject of their meeting with Du Plessis on 1 March 2000. Neither of them were concerned with matters other than the financial consequences of their retrenchment. Neither of them accepted the invitation to lodge any appeal against the company's decision or the manner in which it had been implemented. Neither of them approached Du Plessis, whom both applicants conceded was imminently approachable, to raise any grievances that they may have harboured. While I accept that their motives in failing to do so and thereafter approaching this Court were not mercenary, I would imagine that in some circumstances at best, an employee who has failed to accept invitations such as those extended to the applicants might forfeit a right to compensation.

7] On balance, and having regard to all of the above factors and the relevant weight that should be accorded them in the circumstances, am unpersuaded that I should exercise a discretion that would have the consequence of denying the applicants that right to compensation, I make the following order:

1) that the dismissal of the applicants was procedurally unfair.

2) that each of the applicants should be compensated in an amount equivalent to twelve (12) months remuneration, calculated in accordance with the definition of "remuneration" in s 213 of the Labour Relations Act, 66 of 1995, and having regard to the remuneration earned by them on 31 March 2001; and

3) the respondent is ordered to pay the costs of these proceedings.

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ANDRÉ VAN NIEKERK
Acting Judge of the Labour Court

Date of hearing:	22 June 2001
Date of judgment:	29 October 2001
Counsel for Applicant:	Advocate H Viljoen
Attorneys for Applicant:	Fluxman Rabinowitz
Counsel for Respondents:	Advocate P Pauw SC

Routledge-Modise