IN THE LABOUR COURT OF SOUTH AFRICA

SITTING IN CAPE TOWN

REPORTABLE

CASE NO: C190/2004

HEARD: 2005/05/27

ORDER GRANTED: 10/06/05

REASONS

DELIVERED: 21/06/05

In the matter between

ROGER PARRY **APPLICANT**

and

ASTRAL OPERATIONS LTD **RESPONDENT**

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JUDGMENT

Pillay D, J

Introduction

1. This is a claim for contractual damages, unfair retrenchment and non- or under-payment of various agreed or statutory amounts. It arises from an international employment contract.[1][1] As such, it requires the application of the rules of conflict of laws. Predictably, the preliminary points for determination are jurisdiction of the court and the proper law of the contract.[2][2]

Background

2. About 1977, the applicant commenced employment with Tiger Brands, then a division of the respondent. Over twenty-three years his career advanced steadily until he was appointed managing director of Meadow Feeds (National), a division of the respondent, and in 2001 to the position of director, Astral Foods Ltd, the holding company of the respondent.

3. His position became redundant. By agreement dated 31 July 2001 the respondent retrenched the applicant and paid him severance pay for twenty-three years service, which amounted to about R600 000. He agreed to be re-employed by the respondent in the new position of general manager of Africa Operations from 1 June 2001.

4. The applicant relocated to Malawi. Although he spent most of his time there, he was also responsible for operations in Zimbabwe and Zambia. He accounted to the respondent's board of directors for these operations.

5. In 2002, the applicant initiated the sale of most of the assets of the Malawi operations to Capital Poultry (2000) Ltd with effect from 30 July 2002. The sale was in the interests and with the approval of the respondent. That resulted in his position becoming gradually redundant.

6. About the same time, the applicant was mandated to start a similar operation in Blantyre and have it ready for resale in about six months. The Blantyre operations were sold in November 2002.

7. By memorandum dated 23 July 2002, Mr. J.C. Groenewald, the applicant's immediate superior, advised him that Meadow Feed Mills

1[1] Spiro, E :The General principles of the conflict of laws Juta (1982) 7.
2[2] Schmitthoff, Clive M : The English Conflict of Laws at 6 -7.

(Bryanston) was considering positions for him within the Meadow Group in South Africa, but that this would take some time to finalise. Groenewald also undertook that once Meadow Feeds had withdrawn from Malawi, the applicant would be repatriated to South Africa at the respondent's costs.

8. On 31 October 2002 Groenewald wrote to the applicant to advise that as the Malawi operations were coming to an end, the respondent had no option but to offer him a retrenchment package, based on the respondent's policy. The respondent now contends firstly, that Groenewald had no authority to make such an offer, alternatively, that he was mistaken about the respondent having any obligation to pay the applicant a retrenchment package. Secondly, its retrenchment policy did not apply to employees engaged outside South Africa.

9. The respondent repatriated the applicant to South Africa on 15 November 2002 but the applicant continued to wind up what remained of the Malawi operations.

10. Between 5-12 December 2002 the applicant, at the request of Gustav De Wet, the financial manager, travelled to Malawi to complete certain tasks, mainly in relation to debt collection.

11. The applicant reported back to De Wet on 13 December 2002. There is a dispute about the contents of this discussion. The respondent contends that it was the common understanding of the parties that the applicant's employment with the respondent would terminate once the Malawi operations closed down. The applicant allegedly acknowledged this during the discussion with De Wet.

12. The applicant denies that there was any discussion or understanding about termination of his employment. He believed that he remained in the respondent's employ, despite the redundancy of his position in Africa Operations. De Wet had indicated to him that he might have to return to Malawi in January 2003. It was only on 14 January 2003, after his dismissal, that he advised the applicant that this was no longer required of him.

13. Although the respondent does not deny having discussed the applicant's return to Malawi, it contends that the applicant would have returned to Malawi on a specific contractual basis.

14. It is common cause that during this discussion with De Wet, the applicant raised the possibility of his employment in the position of managing director of Meadow Feeds Northern Region, a position that had been held by Groenewald, who was in the process of being dismissed. He also offered himself for the position of financial manager of the Northern Region. It was not disputed that the applicant

had the experience and skills for both positions. There is a dispute about what De Wet's response was.

15. The applicant contends that De Wet indicated that his appointment to this position or that of financial manager of the Northern Region would not be well received as he had "crossed swords" with someone. De Wet denied saying this. It was the respondent's case that the applicant had not offered himself for the financial manager position and that De Wet himself filled the position. It is not necessary to resolve this conflict of fact for, as it turns out, the respondent did not consider placing the applicant in any alternative position.

16. According to the applicant, the first he knew about his dismissal, which had purportedly been effected on 31 December 2002, was when he opened his e-mail at home and read a letter dated 7 January 2003 from Len Hansen, the human resources and organisation development manager.

Claims

17. Under claim A, the applicant alleges that the respondent is in breach of the contract of employment in that it retrenched him without complying with its retrenchment procedures. He claims R530 131,31 in terms of section 77(3) of the Basic Conditions of Employment Act No. 75 of 1997 (BCEA) for loss of earnings as damages for breach of contract and certain share options and accrued profits.

18. Under claim B, the applicant alleges that the respondent was contractually obliged to:

    i. pay him his monthly salary in the amount of $6680 and R4133;

    ii. give him one calendar month's notice of termination prior to termination of employment; and

    iii. pay him two weeks per year of service as severance pay.

19. The respondent failed to pay him:

    i. notice pay and to give him notice of his dismissal;

    ii. his full salary for November 2002, other than to make a contribution of $540;

    iii. his salary for December 2002, January and February 2003;

    iv. two weeks severance pay for his employment since 1 June 2001;

    v. the balance of his salary for June / July 2002 amounting to $2000;

vi. the balance of his relocation allowances amounting to $680 for June 2001 and $4684 for November 2002;

vii. accrued leave pay for November 2002 to February 2003 in the amount of $2177 and R1272.

The applicant claims payment of these amounts under section 77(3) of the BCEA.

20. Under claim C, the applicant alleges that the respondent failed to comply with section 188(1) and 189 of the Labour Relations Act No. 66 of 1995 (LRA) in almost every respect. For his unfair dismissal, the applicant claims twelve months compensation.

21. Under claim D, the applicant claims as an alternative to his claim under C, a breach of the constitutional right to fair labour practices in terms of section 23(1) of the Constitution of the Republic of South Africa Act No. 108 of 1996.

Issues

22. The issues to be decided are:

i. Jurisdiction;

ii. The proper law governing the contract;

iii. Whether the applicant has a right to loss of earnings as damages for breach of contract;

iv. Whether the applicant is entitled to the various amounts claimed under the BCEA.

v. Whether the respondent complied with section 188 and 189 of the LRA; and

vi. Whether the applicant has an independent claim under the constitutional right to fair labour practices.

Submissions on the points *in limine*

23. The respondent resists all four claims on the basis firstly, that the court lacks jurisdiction and secondly, that South African law does not apply to the contract.

24. Mr Oosthuizen, for the respondent, submitted that the place where the dispute arose is the workplace, which has jurisdiction. In this case the workplace is Malawi. It was a tacit, alternatively, an implied term of the contract that its retrenchment procedure would apply only to

employees to whom the LRA and the BCEA were applicable. As the applicant was employed outside South Africa and beyond the territorial application of South African legislation, the respondent was not bound to apply its retrenchment procedures. He relied on *Chemical & Industrial Workers Union v Sopelog CC,*[3][3]*Bolhuis v Natyre (Pty) Ltd,*[4][4]*Genrec Mei (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering, Metallurgical Industry and Others,*[5][5] *Lamani & Another v CTC Bus Co Ltd & Another,*[6][6] *Transport and Allied Workers Union of SA v Bahwaduba Bus Service (Pty) Ltd,*[7][7]*NH Lunderstedt v Metalix (Pty) Ltd,*[8][8] *Wilson v Maynard Ship Building Consultants AB,*[9][9] *Todd v British Midlands Airways Ltd,*[10][10] *Janata Bank v Ahmed,*[11][11] and *Weston v Vega Space Systems Engineering Ltd.*[12][12]

25. *Kleynhans v Parmalat SA (Pty) Ltd,*[13][13] Mr Oosthuizen submitted, was distinguishable from these cases because Kleynhans was seconded to work in Mozambique for a fixed term. Before the secondment he was employed in South Africa. After the secondment expired he was to return to that employment.

26. He further contended that reliance on the law of the place of work (*lex loci solutionis*) to determine jurisdiction is logical and sensible because of the prohibition on the extra-territorial application of statutes[14][14] and the doctrine of effectiveness.[15][15] He proceeded thereafter to list the following factors connecting the contract to Malawi and disconnecting it from South Africa:

    i. The applicant's initial employment with the respondent had been terminated by retrenchment.

    ii. The new contract of employment did not envisage a temporary sojourn in

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3[3] (1993) 14 ILJ 144 (LAC).
4[4] (1995) 3 BLLR 37 (IC)
5[5] (1995) 4 BLLR 1
6[6] (1988) 9 ILJ 583 E.
7[7] 1989 (10) ILJ 1169 (IC).
8[8] Industrial Court Case NHN 12/3/188 (unreported).
9[9] (1978) ICR 377 at 387.
10[10] (1978) ICR 959.
11[11] (1981) IRLR 457.
12[12] (1989) IRLR 429.
13[13] (2002) 9 BLLR 879 (LC).
14[14] *Bishop and Others v Conrath and Another* 1947 (2) SA 800 (T) at 804; *Viljoen v Venter* 1981 (2) SA 152 (W) at 154 H.
15[15]*Steytler NO v Fitzgerald* 1911 AD 295 at 346; *Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries* 1969 (2)SA 295 (A) at 307; *South Atlantic Islands Development Corporation v Buchan* 1971 (1) SA 234 (C) at 240; *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd* 1987 (4)SA 883 (A) at 893; *Ewing McDonald & Co Ltd v M&M Products Co* 1991 (1) SA 252 (A) at 259-260;

Malawi. He was based there. His wife was to join him there and she had considered opening a guest house there.

iii. He performed no duties for the respondent or any of its South African operations. Neither the fact that he reported monthly to the respondent's head office in Pretoria, nor the fact that he bought some products and machinery in South Africa changed his place of employment.

iv. His salary was paid in Malawi and in the Isle of Mann.

v. He paid PAYE taxes and unemployment insurance in Malawi.

27. Malawi, Mr Oosthuizen said, has its own labour legislation, which sets certain standards and provides remedies for unfair dismissal. He concluded by handing a copy of the legislation to the court downloaded from the Internet as proof of the contents of Malawian labour law.

28. The applicant did not take issue with the respondent on extra-territoriality and the doctrine of effectiveness.[16][16] Principally, the applicant's stance was that it was evident from the contract that the parties had tacitly, alternatively impliedly, chosen South African law as the proper law of the contract. From this, the presumption arises that the parties chose South African courts as the forum to adjudicate their dispute. Alternatively, the parties and the contract had a real connection to South Africa.[17][17] The parties could not contract out of the LRA[18][18] and there is nothing in the contract that suggests that they did.[19][19] Mr Kahanowitz then proceeded to identify the factors connecting the dispute to South Africa.

29. These submissions pre-empt an outline of the conflict of laws approach, a definition of certain technical terminology, a discussion about of the nature of labour law and the characterisation or categorisation of rights in this dispute before deciding *in limine* the issues of jurisdiction and the applicable law.

Conflict of Laws Approach

16[16] *Lamani,* above.

17[17] *Kleynhans*, above.

18[18] *Building Bargaining Council (Southern and Eastern Cape) v Melmons Cabinets CC and Another* (2001) 22 ILJ 120 (LC).

19[19] *Wilson v Maynard Shipbuilding Consultants AB* (1978) ICR 377 (CA) at 385 E-G.

30. Access to academic material on conflict of laws in South Africa has been difficult. Firstly, such material is scarce. Secondly, few libraries stock the material that is available. Reliance on the old authorities has become obsolete.[20][20] Although case law is an important source of law, in the field of labour law it remains underdeveloped. Most texts deal with specific categories such as contract, delict, property and marriage, but not with labour law. Recourse has therefore had to be had to foreign sources,[21][21] cases on contract generally and other categories of law.

31. Another difficulty is that the terminology is technical. It is further complicated by some writers using the same expression to mean different things. For instance, "*lex causa*" is used by Dicey and Morris to mean the appropriate foreign law.[22][22] Spiro uses it to mean the law that governs the issue.[23][23] Hence the definition of technical terms in the judgment.

32. The parties interlinked their submissions on jurisdiction and the choice of law and cited case law that overlaps both issues. There is a tendency to conflate the two, mainly because both involve a process of identifying connecting factors.[24][24] However, the connecting factors relevant to each are quite different.

33. The fact that foreign law is involved is irrelevant to the issue of jurisdiction.[25][25] Logically, jurisdiction is determined before the law applicable to the issue in dispute.[26][26]

34. The first step in the process of selecting the proper law is characterisation.[27][27] What is characterised depends on the way a court approaches a problem. It could be an issue, a set of facts or a rule of law.[28][28] Booysen J was emphatic that it is rules of law which are characterised. Characterisation, he added, is but a tool in the process of reasoning in terms of which those rules are interpreted.[29][29]

20[20] LAWSA Vol 2 Part 2 (2003) 283; *Laconian Maritime Enterprises v Agromar Lineas Ltd* 1986 (3) SA 509 D at 518.
21[21] LAWSA Vol 2 Part 2 (2003) 283.
22[22] Dicey and Morris : The conflict of laws Vol 1 (1993) 3137.
23[23] Spiro 41.
24[24] See the critique of *Kleynhans* by Christa Roodt : Jurisdiction of the South African Labour Court: Employer Indentity and Party Autonomy (2003) 15 SA Merc LJ.
25[25] Schmitthoff 8.
26[26] Schmitthoff 8.
27[27] *Laconian* at 517, Dicey and Morris 36.
28[28] Dicey and Morris 35-36.
29[29] *Laconian* 519.

35. Characterisation is important because the same facts may invoke different rights or rules of law. The facts may give rise to a common law breach of the contract of employment or delict in one jurisdiction and a statutory or mandatory[30][30] breach in another.[31][31] If the statute is an expression of public policy and directs that it be applicable to the facts, that could be decisive of the applicable law.[32][32] A statutory violation is a matter actionable by the state whose laws have been violated.[33][33] This is so despite the wishes or any choice of forum by the parties to the employment contract. Party autonomy can be restricted by public policy considerations[34][34] or by the doctrine of *forum non-conveniens*, if that doctrine forms part of the South African conflict of laws.[35][35] In that situation, the characterisation of the issue as public law or policy settles the question of the forum having jurisdiction[36][36] and the choice of law.

36. Schmitthoff helpfully clarifies that the choice of law may arise at various stages: at the formative stage when the legal right has to be characterised or classified; at the secondary stage when the right has to be connected to one or other legal unit (state) or jurisdiction; and several times thereafter within the same case.[37][37] For instance, in a divorce the South African courts usually determine the personal consequences of the marriage according to the domicile of the spouses, that is, the domicile of the husband at the time of marriage. However, division of the matrimonial property is governed by the domicile of the marriage.[38][38]

37. Schmitthoff continues that once the conflict of laws sets the rules for the choice of law for every right that is in issue, it withdraws[39][39] and the legal issue is determined by application of the chosen or appropriate law.[40][40]

38. Some authorities explain the process as the determination of

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30[30] Defined below.

31[31] Gamillsheg in Blanpain and Engels Comparative Labour Law and Industrial Relations in Industrialised Market economies (1993) 21; 195

32[32] Forsyth, CF : Private International Law; 3rd edition; Juta & Co, Ltd 1996.13.

33[33] Gamillsheg 2; 183.

34[34] Gamillscheg 196.

35[35] Christa Roodt 141.

36[36] Gamillsheg 15/190.

37[37] Schmitthoff 9.

38[38] *Frankel's Estate v The Master* 1950 (1) SA 220 (AD); *Brown v Brown* 1921 AD 478.

39[39] But it can revive if there is a reference back, or if the applicable law is against public policy (Forthsyth 10).

40[40] Schmitthoff 9.

jurisdiction, the characterisation of the right or rule of law,[41][41] followed by the identification of connecting factors according to the *lex fori*[42]*[42]* to determine the appropriate law[43][43] and finally, the ascertainment of the content of the *lex causa*, here meaning the foreign law,[44][44] by adducing expert evidence. The process is not as mechanical as my summary outline suggests. For, as discussed above, the content of the foreign law[45][45] can influence the process of characterisation.[46][46]

39. Like Forsyth, Dicey and Morris also seem to take the view that characterisation should be done in accordance with the domestic law of the forum.[47][47]

40. In employment, the *lex causa*, i.e. the law that governs the legal issue,[48] [48] could be for example the *lex loci solutionis* or the *lex loci contractus*. Which of these two laws should apply depends on the place having the closest and most real connection to the issues.[49][49] It is now fairly settled that the private law of the *lex fori*, i.e. the law of the court seized with the matter, applies to characterise the dispute and determine the connecting factors.[50][50] But this is not an immutable rule.[51][51]

41. Reliance on the *lex causa* for the purposes of characterisation is problematic and has been rejected by Dicey and Morris.[52][52] The *lex causa* depends on rather than determines the connecting factors.[53][53] Some authorities prefer a *via media* or enlightened approach to characterisation.[54][54] According to this approach, while the *lex fori* predominates, the *lex causa* is allowed to influence the characterisation.[55][55]

41[41] *Laconian* 517-518.
42[42] Forsyth 10; *Laconian* 520.
43[43] Forsyth 9-10.
44[44] Forsyth 9-10.
45[45] E.g. if it is mandatory.
46[46] Forsyth 9.
47[47] Dicey and Morris 36.
48[48] Spiro 41,
49[49] *Ex parte Spinazze and Another NNO* 1985 (3) SA 650 (A).
50[50] Dicey and Morris 31; LAWSA Vol 2 Part 2 2003 para 284; *Laconian* 520..
51[51] Forsyth 10.
52[52] Dicey and Morris 37; Forsyth takes the view that the *lex causa* should be used instead of the *lex fori* if nationality is the connecting factor.
53[53] Dicey and Morris 30-31.
54[54] *Laconian* 518-519 and the authorities cited there.
55[55] *Laconian* 518.

42. Proof of foreign law, if it is the applicable law, does not invoke the rules of conflict of laws. Foreign law must be proved by evidence.[56] [56] It is a question of fact not of law.[57][57]The court may take judicial notice of the foreign law if the sources are unimpeachably accurate and authoritative.[58][58]A printout from a website on the Internet is not, without more, such a reliable source. Besides, a labour statute is not proof of the content of the law, in the absence of an agreement between the litigants or evidence of an expert, such as a lawyer.[59][59] Moreover, the court cannot place its own interpretation on the foreign law.[60][60]

The principle of territoriality

43. Sovereignty is the exercise of legislative, judicial or executive jurisdiction by a supreme power over its territory.[61][61] Jurisdiction is intended to have effect only in the territory of the sovereign.[62][62] International comity, in the sense of courtesy amongst sovereigns,[63] [63] encourages adherence to the principle of territoriality and respect for sovereignty.[64][64]

44. Conflicts rules are usually territorial in that they apply only to transactions governed by the *lex fori*.[65][65] They apply extra-territorially when the *lex fori* does not govern the transaction.[66][66] When courts apply foreign law, the principle of sovereignty is not affronted, if it means giving effect to the orders of the sovereign of the forum.[67][67] The primary purpose of conflicts rules is to ensure that justice is done between private litigants.[68][68] However, if the orders emanate from another sovereign, extra-territorial application would be a violation of sovereignty.[69][69]

56[56] Schmitthoff, 9.
57[57] LAWSA Vol 2 Part 2 (2003) para 288; *Laurens v Hohne* (1993) 2 SA 104 (W) 116B.
58[58] LAWSA Vol 2 Part 2 (2003) para 288; Law of Evidence Amendment Act No 45 of 1988 s 1(1).
59[59] LAWSA Vol 2 Part 2 (2003) para 289.
60[60] LAWSA Vol 2 Part 2 (2003) para 289.
61[61] Schmitthoff 10.
62[62] Schmitthoff 11.
63[63] Forsyth 59
64[64] Schmitthoff 10-11.
65[65] Spiro 9.
66[66] Spiro 9.
67[67] Forsyth 58; *Laconian* 520.
68[68] Forsyth 59.
69[69] Schmitthoff 11-12.

The doctrine of effectiveness

45. Courts should exercise jurisdiction if they can give effect to their judgments. Thus if a court has no control over the person or property of the defendant, any judgment it issues would amount to no more than a theoretical proposition.[70][70]

Mandatory or peremptory and directory rules

46. Mandatory or peremptory rules are based on social policy or are of a public policy nature, otherwise they are merely directory. A mandatory rule must be applied by the *lex fori*. Parties can choose the law to apply to a directory rule.[71][71]

Characterising labour law

47. Most legal systems classify labour law into mandatory norms enforced by courts or through grievance procedures and other protective provisions of such social and political significance that special government agencies and inspectorates are entrusted with their enforcement.[72][72]

48. Labour law[73][73] is a hybrid of private and public laws. It is **private law** because the employment relationship is established by contract. Party autonomy and self-regulation are permitted.

49. Labour law has a **public law** component for which a state machinery is assigned the responsibility of monitoring and enforcing employment conditions such as safety, working hours, protection of vulnerable people such as children, pregnant women, disabled and discriminated employees.

50. The private and public law aspects of labour law are also

70[70] Forsyth 150.
71[71] Spiro 9.
72[72] Gamillscheg 193.
73[73] I use the term “labour law” to include employment law.

reflected in international labour law. For instance, ILO standards encourage collective bargaining, consultation and co-operation between employers and workers, on the one hand, and, on the other hand, urge the state to enable that by providing appropriate legislation and dispute resolution machinery.

51. Each country applies only its own public law norms.[74][74] The law of one nation does not have extra-territorial reach because the principle of sovereignty applies.[75][75] The inspectors of the Department of Labour cannot cross the borders into a neighbouring state and enforce South Africa's safety regulations, child labour protections or minimum wage determinations. Moreover, judges are usually disinclined to apply the public law of a foreign nation, mainly because of their unfamiliarity with it. Thus, classification of labour norms as private or public law may be an issue.

52. However, the distinction between private and public law characterization of labour law is not always clear or universally accepted.[76][76] For instance, public law norms, which regulate the relationship between the state and the employer for the benefit of the employee, may be incorporated into private contracts of employment.[77][77] Conceivably, such terms can be enforced as part of the duty of care or as an implied term of the contract.[78][78]

53. In South Africa, an added consideration is the elevation of labour rights to a constitutional right. In my opinion the

74[74] Gamillsheg 3; 184
75[75] Gamillsheg 19; 194
76[76] Gamillscheg 19/193-4
77[77] Gamillscheg 194.
78[78] Gamillscheg 194.

constitutionalisation of labour rights strengthens the public policy and protective components of labour law,[79][79] without annihilating the private law features. Thus party autonomy and self- regulation persist, as that is what the Constitution and LRA encourage through collective bargaining, but within the limits allowed by the Constitution and the legislation.

54. The Labour Court has territorial jurisdiction only in South Africa.[80][80] It also has "exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court," including constitutional issues arising from labour matters.[81][81]

55. Given the wide powers of the court, "any other law" would include a common law conflicts rule arising in labour matters. However, if the court concludes that a foreign law applies, as a creature of statute, it would not have jurisdiction to apply the foreign law. The court acquires jurisdiction only from the LRA, the BCEA and the EEA.

56. "Any law" in conflict with the LRA[82][82] or the EEA,[83][83] other than the Constitution or an amending statute, must yield in favour of these statutes. The term "any law" must also refer to foreign law. Thus institutions exercising jurisdiction[84][84] under LRA or EEA are barred from applying any law, foreign or municipal, which conflict with these statutes.

79[79] See for example the purpose of the legislation : section 1 of LRA, section 2 BCEA section 2 of EEA.
80[80] Section 157 o f the LRA.
81[81] Section 157 o f the LRA.
82[82] Section 210.
83[83] Section 63.
84[84] Discussed further below.

57. Basic conditions of employment in South Africa expressly constitute terms of the employment contract, unless another law or an agreement between the parties contain conditions more favourable to the employee.[85][85] The BCEA prevails over any agreement.[86][86]

58. Public policy norms governing an employment relationship, which cannot be excluded by contract, include provisions that prescribe minimum terms and conditions of employment[87][87] and the protection against unfair discrimination,[88][88] dismissal and labour practices.[89][89] Chapter 10 of the BCEA and chapter 5 of the EEA establish inspectorates within the Department of Labour to monitor, supervise and enforce compliance with the BCEA and EEA respectively by instituting proceedings, if necessary.

59. So comprehensive is the codification that most rights or rules of law are mandatory, protective and of a public policy nature, although they are not always enforced at the instance of the state. This does not render such rights or rules any less mandatory or protective. The state machinery is available for enforcement.[90][90] However, enforcement is usually left to employees to pursue their rights through the courts and grievance procedures. Those who benefit from the enforcement initiatives of the inspectorate are mainly indigent employees who have had their basic conditions of employment violated, such as the non-payment of their remuneration or leave pay.

60. Any employee can enforce such rights without the intervention of the inspectorate. The inspectorate is not a prerequisite for

85[85] BCEA section 4.
86[86] BCEA section 5.
87[87] See for example sectoral determinations in chapter 8, especially sections 55(4) and 57 of the BCEA.
88[88] Employment Equity Act No. 55 of 1998.
89[89] See Chapter 8 of the LRA.
90[90] Chapter 10 of the BCEA and chapter 5 of the EEA.

individual employees exercising their rights. That is my view in so far as it involves the inspectorate as part of the state machinery.

61. However, there are other institutions established with some participation by the state, whose intervention cannot be dispensed with. Here I refer to the Commission for Conciliation, Mediation and Arbitration (CCMA) and councils. Almost all disputes between employers and employees under the LRA and discrimination disputes under the EEA must be referred to conciliation before the CCMA or a council having jurisdiction. The referral for conciliation is not dependent on whether the right is characterised as mandatory, public law, directory or private law. It is a procedural step that is jurisdiction conferring either on the CCMA, council or court that ultimately adjudicates the dispute.[91][91]

62. The above analysis leads me to conclude that labour legislation in South Africa is directly applicable to all employment in South Africa.[92][92] South African employers cannot contract out of the legislation, unless the statute allows it. What the position might be if the parties choose foreign law to apply to the contract is discussed below.

63. As the *lex fori* the court has identified the issues in dispute above. The applicant pleaded various breaches of a contract of employment. His claims are founded in common law, South African labour legislation and the Constitution. Against these facts and the above analysis of labour legislation in South Africa, the question of which law should apply when characterising the issues is academic because of the identity of classification and content.[93][93]

91[91] Discussed further below.
92[92] Forsyth 13.
93[93] *Laconian* 518.

64. However, the applicant was employed in Malawi. The applicability of the *lex loci solutionis* should be investigated.

Lex loci solutionis

65. Until *Kleyhans*, the weight of judicial[94][94] and academic opinion in South Africa was that a contract of employment must be determined by the law of the place where work is done.[95][95] For instance, in *Chemical & Industrial Workers Union v Sopelog CC*[96][96] the LAC had to determine the jurisdiction of the Industrial Court based on its interpretation of the LRA of 1956. Scott J concluded that it could not have been the intention of the legislature to attribute a *locus* different from that of the workplace.

66. Mr Oosthuizen, while distinguishing *Kleynhans*, did not reject it as being wrongly decided.

67. The explanation for the preference generally of the *lex loci solutionis* is that notionally, employees are too weak to resist a choice of law imposed by the employer. The law of the place of work then becomes normally applicable.[97][97] Another reason for preferring the law of the place of work is that, as discussed above, protective labour laws are so closely connected to the social order of the state of the forum, that their application is mandatory and independent of the proper law of the contract.[98][98] The territoriality of labour laws reinforces preference for the law of the place of work.[99][99]

68. However, the law of the place of work can disadvantage workers if it offers less protection than the law of the place chosen by the parties.[100] [100] The trade off of party autonomy in favour of the place of work does not always serve to protect workers. For instance, parties may choose the law of Canada because, apart from having some connection to the contract, it provides as much as twenty-five months notice for dismissal.[101][101] But if South African law has to apply because the employee works here, she would be entitled to no more than the statutory notice of a maximum of four weeks,[102][102] unless the parties

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94[94] See Kleynhans at 16, the cases cited there and the reasons for distinguishing them.
95[95] Gamillscheg 15/189.
96[96] (1993) 14 ILJ 144 (LAC).
97[97] Gamillscheg 15/189.
98[98] Gamillscheg 15/190.
99[99] Gamillscheg 15/190.
100[100] Gamillscheg 16/190-191.
101[101] Levitt, Howard, A : The Law of Dismissal in Canada Chapter 8.
102[102] Section 37 of BCEA; Gamillscheg 16/190.

agree on longer notice.

69. Gamillscheg[103][103] warns that while the legal system of the place where the work is carried out is of paramount importance, the issue still remains one of the employment relationship. He adds:

> "A legal relationship has its roots not in a place but in a legal system. The law does have a place of territorial validity where it is the *lex fori*, however, this territorial factor is but one of several potentially relevant determining aspects, the place of work is an important point of consideration but far from being the only one."[104][104]

70. The special features of international employment contracts are recognised in international law. For instance, Article 6 of the Convention on the Law Applicable to Contractual Obligations,[105][105] (the Rome Convention) firstly recognises party autonomy by permitting a contract of employment to stand, provided a choice of law made by the parties does not have the result of depriving the employee of the protection afforded to her by the mandatory rules of the law which would be applicable in the absence of choice. Secondly, in the absence of choice, a contract of employment is be governed:
(a) by the law of the country in which the employee habitually works; or
(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated; unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

71. South Africa is not bound by the Convention. Perhaps the time is ripe to consider it. In the meantime, having considered international law as it must,[106][106] the court is guided by the Convention. It protects workers. Contracting parties retain their autonomy. Nothing in the Convention conflicts with the Constitution or our labour laws.

72. The Convention will be especially helpful in cases where the parties choose foreign law to apply to a contract concluded in South Africa, or if the employer is South African. Guided by the Convention, the first enquiry would be to establish that the employee has not been deprived

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103[103] Gamillscheg 12/187.
104[104] Gamillscheg 12/187.
105[105] opened for signature in Rome on 19 June 1980 (80/934/EEC)
106[106] Section 39(1) of the Constitution.

of the protection of the mandatory rules. Given the breadth of the mandatory provisions of South African labour legislation, discharging this onus is a hard row to hoe. Added to this is the onus on the party relying on the foreign law to prove its contents. A convention will not only facilitate adjudication of international employment contracts in South Africa but also discourage foreign law being chosen to avoid the protection provided by South African law. Effectively, a convention similar to the Rome Convention will complete the circle of protection afforded by the regulatory framework.

Jurisdiction

73. I return to the facts of this case.

74. The parties to this dispute are South African. The contract was concluded and allegedly breached in South Africa. Accordingly, the cause of action arose in South Africa.

75. The respondent repatriated the applicant when the operations in Malawi were closed. He continues to live in South Africa. The respondent is a company registered in terms of the company laws of South Africa and trades on the Johannesburg Stock Exchange. The doctrine of effectiveness applies.

76. Clause 15 of the contract of employment subjects the applicant to the respondent's policies. Its human resources policies incorporate references to the LRA and the BCEA. As the policies are those of a South African company operating in South Africa, they must be consistent with South African law. Therefore, not only is the BCEA incorporated automatically by law,[107][107] the parties impliedly also chose South African law to apply to the contract.

77. The causes of action are common law breaches of the contract of employment, statutory breaches of the LRA, alternatively the Constitution, and the BCEA. All the claims are founded on mandatory laws of South Africa. They all fall within the jurisdiction of the Labour Court which, as the *lex fori* governs the transaction.

78. As indicated above, the respondent has not proved the contents of Malawian law. In any event a Malawian court could refuse jurisdiction. On the basis of the principle of sovereignty it cannot be expected to apply mandatory laws of another state.

79. The Labour Court of South Africa accordingly has jurisdiction over the parties and the causes of action.

107[107] Kleynhans at para 25.

The Proper Law of the Contract

80. The proper law of a contract may be an express choice, a tacit choice or, in the absence of any choice, be assigned by the court.[108][108] In this case, the parties did not include an express choice of law clause in the contract.

81. The court has found above that the parties tacitly, alternatively impliedly, chose South African law. A choice of jurisdiction is an indication of a choice of law,[109][109] although the converse is not necessarily true.[110][110] Here follows further evidence in support of the conclusion that the parties chose South African law:

i. The contract is a standard template used by the respondent for employees engaged in South Africa and abroad.

ii. The contract is for employment. It was prepared in South Africa for South Africans.

iii. Despite denying initially in proceedings before the CCMA that it was the employer, the respondent admitted in these proceedings that it was the employer.

iv. The applicant remained under the control and supervision of the Board of the respondent. He represented "the employer" in Malawi. There was no one more senior to him there.

v. The applicant was on the payroll of the respondent's South African head office. The respondent paid his salary and reviewed his performance for annual salary adjustments. Such review was linked to the respondent's performance and effected in accordance with the latter's policy.

vi. The applicant continued to contribute to the Tiger Brands Provident Fund and was subject to its rules and regulations. Deductions were made from his salary for this purpose.

vii. He also remained a member of

108[108] Forsyth, 283.
109[109] Christa Roodt 137 and the cases cited there.
110[110] Gamillscheg 196; Christa Roodt 137; 139-140.

the Tiger Brands Medical Society and was obliged to join any other Society with which the respondent contracted.

viii. Although the applicant was conditionally released from his restraint of trade agreement, which he had concluded before his 2001 retrenchment, payment made by the respondent in respect of that agreement would have been forfeited if the applicant breached the condition in the Africa Operations contract of employment.

ix. As a term of his employment, the applicant retained his shareholding in Tiger Brands, a company listed on the Johannesburg Stock Exchange.

x. The respondent acknowledged some of its obligations, namely :

a. paying the applicant's relocation costs on repatriation, although it now claims a refund of a pro rata share.

b. giving an undertaking in the contract of employment to pay future severance pay, although it now disputes any obligation to do so.

c. Groenewald indicating to the applicant that the respondent would consider employing him and Daan Storm, the production manager in Malawi, in South Africa. Daan Storm was employed in South Africa. The applicant was not for reasons which are discussed below.

82. Normal hours of work was to be determined "by relevant legislation". Likewise, sick leave was subject to the conditions prescribed "by relevant legislation". The reference to "relevant legislation is ambiguous. It could be a reference to South Africa legislation i.e. the BCEA or it could be a reference to the legislation of Malawi, Zimbabwe or Zambia where he rendered services for the respondent. The claim in this case is not based on hours of work or sick leave. Therefore it matters not whether the reference is to foreign or South African legislation.

83. Applying the "officious bystander" test[111][111] there can be no doubt that the only law applicable to the employment relationship in the minds of the parties at the time of contracting was South African. In fact, it was not until the respondent obtained legal advice that it alleged Malawian law applied to the contract. Neither party was familiar with Malawian law. It was not until closing arguments were presented that the respondent was able to produce a copy of it.

84. If I am wrong in finding that the parties tacitly or impliedly exercised a choice of law, then the same factors that I have identified as indicators of an implied choice of law are also strong factors connecting the contract, the disputes, the parties and their rights to South Africa.

85. The applicant rendered services in four countries: South Africa where he attended board meetings as part of his job, Malawi where he was based most of the time, Zimbabwe and Zambia where he supervised the operations for the respondent. The conflicts rule of the law of the place where work is done is clearly inappropriate in the circumstances.

86. The redundancy of his position did not terminate the relationship. The agreement continued, albeit on varied terms.

87. The fact that the applicant paid taxes to the Malawian Government, that he was based mainly in Malawi, or that his wife had considered establishing a guest house there, are not sufficiently strong connecting factors to dislodge South African law as the proper law of the contract.

88. I conclude therefore that the applicable law is South African.

Claim A: Damages for breach of contract

89. Mr Kahanowitz for the applicant relied on *Fedlife v Wolfaard,*[112][112] *Denel (Pty) Ltd v Vosloo*[113]*[113]* and *Buthelezi v Municipal Demarcation Board*[114][114] in support of this claim. He submitted that it was an explicit, alternatively implied, further alternatively, a tacit term of the contract that the respondent would terminate the contract fairly, that is, for good cause and by applying fair procedure. He

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111[111] *Rail Commuter Action Group and Others v Transnet Ltd T/A Metrorail and Others* (No 1) 2003 (5) SA 518 (C) at 568-570; *Smith NO and Another v Van Reenen Steel (Pty) Ltd and Another* 2002 (2) SA 613 (D) at 623; *Botha v Coopers & Lybrand* 2002 (5) SA 347 (SCA); *Maritime Motors (Pty) Ltd v Von Steiger and Another* 2001 (2) SA 584 (SE) at 595-596; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531H - 532C;

112[112] (2001) 12 BLLR 1301 (A).

113[113] (2005) 4 BLLR 313 (SCA) at para 16.

114[114] (2004) 25 ILJ 2317 (LAC) at paras 12-14.

referred to clause 15 of the contract and to the fact that at the time of contracting, the parties were mindful that the LRA[115][115] and the Constitution prohibit unfair dismissal. The respondent breached its obligation to act fairly. The applicant accepted the repudiation, cancelled the contract and claimed contractual damages.[116][116] Such damages is not the equivalent of notice pay, as suggested by the respondent. It is the equivalent of the applicant's loss of earnings up to the date of the trial because he would still have been employed if the applicant had not dismissed him unfairly. So it was submitted for the applicant.

90. The respondent denied firstly, that the applicant suffered any damages and contended that the applicant failed to establish a causal link between the alleged breach and the damages allegedly suffered. Moreover, it was a duplication of claim C. To allow a common law claim additionally to compensation in terms of section 194 of the LRA would revive the spectre of compensation for dismissal being limitless and having to be proved by actuarial evidence.[117][117] That was the direction which jurisprudence under the old LRA had taken, which the new LRA seeks to avoid by capping compensation claims.[118][118]

91. Secondly, compensation under section 194 is not patrimonial but in the nature of a *solatium*.[119][119]

92. The third submission for the respondent was that *Fedlife* permits employees to sue for the balance of their common law damages, which is limited to the remuneration payable to the employee as if the employment had been terminated lawfully with proper notice. At most therefore, the applicant was not entitled to more than one month's pay as contractual damages. However, as the applicant already claims notice pay under claim B, he is not entitled to any amount as contractual damages.[120][120] So the argument went.

115[115] *Key Delta v Marriner* (1998) 6 BLLR 647 (E).

116[116] *Mafihla v Govan Mbeki Municipality* (2005) 4 BLLR 334 (LC) at paras 44-45.

117[117] *Jonker v Amalgamated Beverage Industries*, (1993) 14 ILJ 199 (IC); *Ferodo (Pty) Ltd v De Ruiter*, (1993) 14 ILJ 1008 (LAC); *Camdons Realty (Pty) Ltd v De Ruiter* (1993) 14 ILJ 1008 (LAC).

118[118] Jonathan Goldberg, "Money Matters: Compensation under the New Act" (Employment Law, Vol 12, No 3, p 54):

119[119] *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC)

120[120]Cotler v Variety Travel Goods (Pty) Ltd, 1974 (3) SA 631 (A); *Tiopaizi v Bulawayo Municipality* 1923 AD 317; *Grundling v Beyer* 1967 (2) SA 131 (W);*Farring v Arkin* 1921 CPD 286; *Beeton v Peninsula Transport Co (Pty) Ltd* 1934 CPD 53 at 59; *Myers v Abrahamson* 1952 (3) SA (C) at 127 D-

93. In *Fedlife,* the Supreme Court of Appeal considered whether the LRA interfered with existing common law rights and concluded that it did not, based on the presumption of the validity of existing law.[121][121] It found that the LRA does not expressly abrogate an employee's common law entitlement to enforce contractual rights.[122][122] Section 195, it said, does not exclude a claim for contractual damages[123][123] as it could not have been the intention of the legislature to enhance the security of the class of employees who have no contractual security of employment by simultaneously exacting a prejudicial *quid pro quo* from another class of employees. Effectively, employees who secure by agreement better conditions of employment than those offered in the legislation should not be disadvantaged by having to yield any of their superior conditions of employment, irrespective of whether their claims are framed as unlawful dismissal under the common law or unfair dismissal under the LRA and the Constitution. The interim[124][124] and final Constitutions which guaranteed fair labour practices did not deprive employees of their common law right to enforce a fixed term contract.[125][125]

94. What then are the common law rights on dismissal of an employee engaged in terms of a contract for an indefinite period?

95. Historically, the legislature introduced in 1979 the unfair labour practice jurisdiction of the industrial courts in order to supplement the inadequate common law rights of employees, whose services might otherwise be terminated lawfully at will, even if the termination was unfair.[126][126] Termination at will was lawful if proper notice was given.

96. By the 1990's compensation awards under unfair labour practice claims became substantial as employees strove to prove patrimonial losses by leading expert actuarial evidence. To end the uncertainty and difficulties created by the breadth of the unfair labour practice jurisdiction, the LRA of 1995 defined unfair labour practices[127][127] and capped compensation claims.[128][128]

97. The common law entitlement of an employee for contractual damages

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G; *Santos Professional Football Club Limited v Igesund* 2003 (5) SA 73 (C)
121[121] Fedlife para 16
122[122] Fedlife para 17
123[123]Fedlife para 19 & 20.
124[124] Act 200 of 1993.
125[125] *Fedlife* Para 15.
126[126] Para 13.
127[127] Section 186 of LRA.
128[128] E.g. section 194 of LRA.

for breach of an indefinite contract is what s/he would have earned from the date of the dismissal to the earliest date after that upon which the employment could lawfully have been terminated.[129][129] Effectively, this is the notice period. Loss of benefits such as pension rights and other benefits payable during the notice period must be included in the claim. Amounts earned by the employee during this period must be deducted from the claim.

98. Although the respondent's human resources policies provided for four weeks notice on termination of employment, the respondent conceded that the applicant was entitled to one calendar months notice. His damages would be the equivalent of his salary for one calendar month, plus his car allowance, pension and medical aid benefits for that period. However, any award of notice pay must be deducted from these damages.

99. In addition, the applicant would have acquired certain share options and accrued profits if he had not been dismissed unlawfully. It is not clear when the share options matured. However, the applicant attempted to exercise his options in October 2003. The respondent allegedly resisted the claim on the basis that he was no longer an employee. In the absence of any better evidence as to when his share options accrued, and whether it was conditional upon him being an employee, I direct that the applicant be paid his share options and accrued profits that matured as at 28 February 2003.

100. The need for certainty and limitation of compensation claims in labour disputes is a matter of socio-economic policy.[130][130] Furthermore, the elevation of labour rights as a socio-economic constitutional right re-enforces the need to balance the various competing interests in labour disputes. Consequently, an award of damages under the common law should be factored into the assessment of compensation under section 194 of the LRA.

Claim B: claims under the BCEA

Notice Pay

101. The evidence for the respondent was that the applicant was notified orally of his retrenchment at the meeting with De Wet on 13 December 2002. De Wet testified that it was not up to him but someone senior to him, such as Hansen, to notify the applicant of his dismissal. Hansen confirmed that until his e-mail of 7 January 2003, he had not notified the applicant of his dismissal, which was purportedly effected on 31 December 2002. Precisely who took the decision to

129[129] Wallis MJD *Labour & Employment Law*; 40.
130[130] See Explanatory Memorandum to the LRA 1995 ILJ p316 and 320.

dismiss the applicant, when it was taken, and when, before 7 January 2003, it was communicated to the applicant, was not proved.

102. The respondent admitted that the applicant was entitled to one calendar month's notice, which ought to have been served during February 2003. Despite this admission the respondent also admitted that it backdated the termination notice on 7 January to 31 December 2002. Notwithstanding these contradictions, the respondent persisted that the applicant's employment was lawfully terminated with one calendar month's notice. The applicant, it claimed, was aware in October that his employment would be terminated on 31 December 2002.

103. Groenewald had informed the applicant on 31 October 2002 that he would be retrenched without giving him a date. On 16 November 2002 he received a copy of a letter sent by Groenewald to De Wet about giving the applicant a certificate of employment and details of his retrenchment package. Still, no date was set for the retrenchment; no discussion had occurred about alternatives to retrenchment. The applicant would have expected to be consulted about alternatives before he was dismissed. After his relocation to South Africa on 15 November 2002, he was despatched back to Malawi between 5 and 12 December 2003. He was also expecting to return there again in January 2003. In all these circumstances the applicant's evidence that he was not aware of his dismissal until 7 January 2003, after it was effected, must be accepted.

104. On the respondent's own version the applicant was not given any notice of his dismissal. Notice given after his dismissal is no notice at all. The applicant is therefore entitled to one calendar month's notice pay.

Salary for November, December, January and February

105. De Wet had undertaken in writing on 14 January 2003 to transfer the applicant's salary for November and December 2002 into his account. This was not done. The respondent admitted that the applicant is entitled to his salary for November and December 2002 but alleged that its payment of R15 685,28 for medical aid and pension for those months, its overpayment of the relocation allowance $4000 and its pro rata claim to a refund of the relocation allowance of R 52 568,00 had to be deducted from monies due to the applicant.

106. The respondent claims the amounts in respect of the relocation allowance in terms of clause 3.5 of the Group Human Resource Policy. Recalling that it contended *in limine* that the policy did not apply to the applicant, the basis of the claim is disingenuous. Moreover, on a proper construction of the clause the respondent may claim such a

deduction if the relocation was at the instance of the applicant. His relocation was occasioned by his position becoming redundant, that is, by circumstances beyond his control.

107. Groenewald had undertaken on behalf of the respondent to pay the applicant's relocation costs. The respondent did not inform the applicant that he had no authority to do so or that he was mistaken, until litigation commenced.

108. The respondent has led no evidence to support its claim to any of the other deductions. Significantly, the deductions were not included in the counterclaim. If the respondent seriously believed that it was entitled to these deductions it would have made a better effort at pleading and proving them. The respondent is not entitled to any of the deductions.

109. Based on the respondent's admissions, the applicant is entitled to his salary for November (balance) and December 2002. He is also entitled to his salary for January 2003 as he only received notice of his dismissal in that month. He is not entitled to a salary for February 2003 as he is awarded notice pay.

Severance pay

110. The respondent undertook in the contract of employment to pay "future …severance pay … .from the date ….. when the employee takes up the new position". Its explanation for not abiding by this undertaking, namely that it was advised by its attorney that it had no obligation to pay this and other amounts owing to the applicant because he was employed in Malawi, cannot relieve it of its contractual commitment. It committed itself in June 2001 but received the advice only about December 2002. The respondent gave the undertaking in the full knowledge that the applicant would be employed in Malawi. Such a breach is manifestly dishonourable.

111. The applicant is accordingly entitled to two weeks severance pay.

Underpayment of salary for June and July 2002

112. No case was made out that the applicant was paid for this period. Nor has the respondent advanced any reason for not paying the applicant for this period.

113. The applicant is entitled to these underpayments.

Relocation allowances

114. Based on the findings above, the applicant is entitled to the balance of his relocation costs.

Accrued leave

115. It follows from the above findings that the applicant is also entitled to his accrued leave for November 2002 to February 2003.

Claim C: Unfair retrenchment

116. The respondent pleaded in the alternative to its points *in limine* that, in so far as it was obliged to comply with the provisions of the LRA, it did so by consulting adequately with the applicant. During discussions between the applicant, Groenewald and De Wet it was commonly understood that his employment would terminate when the Malawian operations closed down. Moreover, the applicant was fully aware of all the material facts pertaining to his dismissal, he having initiated and negotiated the sale of the Malawi operations himself. He had every opportunity to raise and discuss any issues about the termination of his employment with Groenewald and De Wet. He was aware that there were no alternative positions for him in the respondent's Africa Operations division. The purpose of consultations was effectively achieved. So it was submitted.

117. Regarding alternative employment, Hansen testified that the respondent did not consider employing the applicant in South Africa, firstly, because he knew what positions were available and there were none suitable for the applicant. Secondly, the respondent had no obligation to employ him after the Malawi operations were closed as no such undertaking was given by the respondent when it contracted with him. In addition, he was employed by Meadow Feeds Malawi as his appointment was made on the letterhead of that entity. Thirdly, the applicant's performance was under par. Hansen alleged that the applicant did not manage debtors successfully and he failed to implement effective internal controls.

118. The respondent conceded that it did not comply will all the requirements of section 189 of the LRA. Mr Oosthuizen urged the court not to take a mechanical checklist approach to section 189, and to find that there was adequate notice and consultation with the applicant.[131][131]

119. Further alternatively, the respondent contended that the applicant should not be awarded any compensation given the short

131[131] *Atlantis Diesel Engines (Pty) Ltd v National Union of Mineworkers of SA* 1995(3) SA 22 (A); *Imperial Transport Services (Pty) Ltd v Sterling* (1999) 3 BLLR 201 (LAC); *CWIU v Lennon Ltd* (1994) 10 BLLR 278 (LC); *SACTWU & Others v Discreto (A Division of Trump and Springbok Holdings)*, (1998) 12 BLLR (LAC).

duration of his employment, the fact that he started a new job on 1 March 2003 and that his patrimonial loss was limited. Moreover, he failed to make any suggestions about alternative employment other than the position of managing director of Meadow Feeds Northern Region, which Groenewald was about to vacate as a result of his own dismissal for misconduct. The respondent conceded that it did not consult properly with the applicant about this alternative position but contended that it was raised at a very late stage.[132][132]

120. By no stretch of any argument can it be said that the retrenchment of the applicant was procedurally and substantively fair. To begin with, the respondent could not say who took the decision to dismiss the applicant.

121. On the respondent's own version it did not notifying the applicant clearly and in advance of the date of his dismissal on 31 December 2002.

122. The respondent undertook to consider him for other positions but did not actually do so. It hardly lies in its mouth to complain that the applicant presented only one alternative and that he did so very late in the process. The respondent would have had a bird's eye view of its organisation and the available positions. The LRA places an onus on the respondent, not the applicant, to ensure that the dismissal was fair. To this end, the respondent was obliged to explore alternatives to retrenchment. The applicant's suggestion could not have been made any earlier as Groenewald still filled the position and was only in the process of being disciplined at the time.

123. To suggest for the first time during the trial that the reason for not finding the applicant an alternative position was because of his alleged poor performance, is manifestly contrived. As the applicant was not confronted with this allegation while he was still employed, he had no way of knowing what was wrong with his performance or how he might remedy it, assuming that it needed remedying.

124. The applicant's alleged poor performance was not pleaded. Nevertheless, the respondent led evidence and cross-examined the applicant on the issue. In rebuttal, the applicant explained that the business was very vulnerable to currency fluctuations. When the rand weakened, the respondent sustained losses. Predictably, this evidence goes unchallenged as the respondent had closed its case by then.

125. The respondent did not consult the applicant at all about fair

132**[132]** *Riveiro & Another v JSN Motors* (1995) 18 BLLR 93 (IC); *Numsa & Others v Dorbyl Ltd & Another* (2004) 9 BLLR 914 (LC)

selection criteria. Poor performance is not a fair selection criterion if no prior corrective measures were implemented.

126. The respondent reneged on its written undertakings to pay severance pay, the relocation allowance and the applicant's salary for November and December 2002.

127. Groenewald informed the applicant on 31 October 2002 that he would be retrenched without giving him notice of the date of his dismissal and without consulting with him about alternative employment. Despite the respondent's short-comings, the applicant continued to engage the respondent constructively with a view to finding alternative positions for himself.

128. The respondent's contention that the applicant knew that he would be without a job once the Malawi operations closed, is improbable. If that were so the applicant would not have initiated and concluded the sale of the assets of that business, at least, not without first attempting to secure his own position. It is hardly likely that the applicant would have deliberately worked himself out of employment altogether.

129. The applicant was aware that his position would become gradually redundant after he had concluded the sale of the assets of the Malawian division. He did not realise that he would be without a job until after he was in fact dismissed.

130. Initially, the respondent seems to have had good intentions of acting fairly towards the applicant. Groenewald's letter to the applicant on 23 July 2002 conveys this. For reasons that have not emerged clearly from the evidence, the good intentions dissipated over the next five months. The first and only indication that the applicant had that someone within the respondent was unhappy with him was when De Wet told him that he had "crossed swords" with someone. Although De Wet denied saying this, the probabilities are that someone within the respondent's hierarchy was antagonistic towards the applicant.

131. The respondent became vindictive towards the applicant when it withheld payments that it admitted were due to him on the basis that it had a counterclaim based on his alleged breach of contract for failing to collect outstanding debts due to the respondent.

132. The counterclaim was entirely spurious for it emerged from De Wet's evidence that he had instructed the applicant not to return to Malawi to recover debts as the respondent wanted to "cut (its) losses and close". Despite De Wet communicating this to the applicant as far back as 17 January 2003, the respondent persisted with its counterclaim in May 2004.

133. Predictably, the applicant raised several objections *in limine* to the counterclaim. Eventually, the respondent decided three weeks before the trial to withdraw the counterclaim. It only did so four days before trial.

134. In my opinion the counterclaim was not genuine. It was a frivolous litigation strategem which must attract a punitive order for costs.

135. In all the circumstances, the retrenchment was procedurally and substantively unfair.

136. My award of compensation takes into account all the relevant circumstances including :

i. The respondent was devious in its dealings with the applicant by reneging on written undertakings to the applicant.

ii. The respondent's opposition was disingenuous, relying on the written contract of employment when it suited it, and distancing itself when the contract favoured the applicant.

iii. The applicant had twenty-five years service with the respondent.

iv. The applicant was loyal to the respondent having put the latter's interests above his own by selling the assets of the Malawi operations. He could not have held such senior supervisory positions if he had not consistently proven his commitment.

v. Hansen, who had been employed for about a year before the applicant's first retrenchment, was insensitive in what he did as much as in what he did not do in ensuring a procedurally fair dismissal. Informing any employee, let alone one who has given 25 years of service to his employer, by email of his dismissal is hardly the caring conduct expected of human resources personnel.

vi. The respondent is a big company. It is listed on the stock exchange and has several subsidiaries and divisions. The probabilities are that if the respondent had considered employing him, a position could have been found for him somewhere

within the organisation. Alternatively, the respondent could have assisted in placing him elsewhere.

vii. The applicant found employment in March 2003, although at a lower rate of pay.

viii. The applicant was over fifty years old when he was subjected to the anxiety of being jobless.

137. So reprehensible has the respondent's conduct been, so gross the violation of the applicant's dignity that, despite the applicant being awarded contractual damages under section 195 of the LRA, he should be also be awarded the maximum compensation allowed under section 194 of the LRA.

Claim D alternative to claim C: Constitutional right to fair labour practice

138. This claim falls away as it is in the alternative.

Respondent's amendment

139. The respondent applied to amend the pleadings. At the conclusion of the proceedings such objection as there was fell away. However, the amendment did require consideration and additional work for the applicant, especially as it resulted in certain contradictions that I identified above. In allowing the amendment therefore, I nevertheless intend to order the respondent to pay the applicant's costs of it.

Computation

140. The parties undertook to resolve the calculation of the amounts payable to the applicant on the basis of the order that I grant. Any dispute arising in this regard should be referred to the court on the same papers, supplemented in so far as may be necessary, so as to enable the court to determine the issues in chambers, if possible.

Order

141. Hence the order I granted on 6 June 2005, varied below at (i) by the elimination of the duplication of notice pay at (iii), the inclusion of the car allowance, medical aid and pension benefits payable for one month and a reference to the BCEA. The respondent must pay the applicant :

i. the car allowance, medical aid and pension benefits for one month, as damages for breach of contract under section 77(3) of the BCEA read with section 195 of the LRA.;

ii. the value of his share options and accrued profits that matured as at 28 February 2003;

iii. one month's pay as notice pay;

iv. the balance of his salary for June, July and November 2002;

v. his salary for December 2002 and January 2003;

vi. two weeks pay as severance pay;

vii. the balance of his relocation allowances;

viii. his accrued leave for November, December 2002, January and February 2003 ;

ix. twelve months compensation for unfair retrenchment under section 194 of the LRA;

x. Interest on the aforesaid amounts at the prescribed rate;

xi. his costs of the counterclaim on an attorney and client scale;

xii. his costs of the application for amendment on a party and party scale; and

xiii. his costs of the action on a party and party scale.

Pillay D, J
21 June 2005