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IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

Case No. **JS239/04**

In the matter between:

TREVOR MATHEWS Applicant

and

GLAXOSMITHKLINE SA (PTY) LIMITED Respondent

JUDGMENT

1.

2. NEL AJ

3. The Applicant brought this matter before this Court in terms of Section 157(2)(a) of the Labour Relations Act, Act No. 66 of 1995 ("**the LRA**"), alternatively, in terms of Section 77(3) of the Basic Conditions of Employment Act, Act No. 75 of 1997 ("**the BCEA**").

4. Section 157(2)(a) of the LRA reads as follows:

5. "*(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South* Africa, 1*996, and arising from –*

a) employment and from labour relations;

b) …

c) …"

6. Section 77(3) of the BCEA states the following:

> "*(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.*"

7. The following is a summary of the facts which were either common cause or which I find to be the facts on which this case has to be decided, following the evidence adduced at the hearing of this matter.

8. The Applicant was on 1 May 1996 appointed as the Information Technology Manager with a predecessor company of the Respondent.

9. On or about 1 August 2003, the Respondent commenced with a retrenchment and restructuring exercise. At this time the Applicant was the Information Technology Director of the Respondent.

10. The Applicant's position had been identified by the Respondent as having become redundant and after the Applicant and the Respondent had entered into negotiations pertaining to his proposed redundancy and retrenchment, an agreement was reached on the Applicant's proposed dismissal for operational reasons except for two issues, namely:

11. the Applicant wanted the Respondent to continue paying his medical aid benefit after June 2004 for the rest of his life; and

12. that the Respondent should settle the whole or full amount outstanding on the Applicant's motor vehicle.

13. The Applicant's last day of physical employment with the Respondent was 30 November 2003 and the notice period of 7 months agreed to between the parties commenced on 1 December 2003.

14. Notwithstanding the fact that agreement on the two mentioned issues could

not be reached, and that the Applicant's last day of physical employment with Respondent was by agreement 30 November 2003, the parties continued consulting and negotiating on these two outstanding issues.

15. Proposals and offers made by the Respondent in respect of these two outstanding issues were however not acceptable to the Applicant.

16. Whilst the whole or full amount outstanding on the Applicant's motor vehicle was not settled by the Respondent as part of his retrenchment, it was common cause between the parties that at least two other employees of the Respondent, Messrs B Brink and M Bagg, did receive payment in full of the settlement amounts on their motor vehicles on their retrenchment, which retrenchment was previous to the Applicant's retrenchment and not part of the restructure which affected the Applicant's employment.

17. The medical aid offer made by the Respondent to the Applicant was to the effect that the Respondent would only pay the Applicant's monthly contribution to his medical aid up to June 2004. From then on the Applicant himself was to make payment of his monthly contributions to the medical aid.

18. In respect of the Applicant's car allowance, the Respondent would not agree to pay the whole of the outstanding amount of the Applicant's motor vehicle and the Applicant remained liable to pay the balance outstanding in the amount of R88 533.

19. The reason why the Applicant was not prepared to accept the Respondent's offers was that the Applicant contended that these offers were not equivalent, similar to or the same as offers made to other executive employees of the Respondent who were also retrenched in the same retrenchment exercise. During the hearing of this matter it became evident that what the Applicant was particularly aggrieved about in this regard was that the Respondent had offered to continue paying the medical aid contributions of Dr P Moore, the Respondent's erstwhile Medical Director, for the remainder of his life.

20. The Applicant was 53 years old at the time and Dr Moore was only a year or

so older than the Applicant. Had the Applicant or Dr Moore attained the age of 55, and then retired from, or saw their services terminated by the Respondent for operational reasons, they both would have qualified for their medical aid contributions to be paid by the Respondent for the remainder of their lives.

21. Whilst the facts and reasons surrounding the termination of employment of Dr P Moore were in dispute, the uncontroverted evidence adduced by the Respondent was to the effect that, on objective grounds, Dr Moore's position had not become redundant. Accordingly, so it was testified, Dr Moore could not as a matter of law and fairness be retrenched by the Respondent. However, a negotiated settlement was reached with Dr Moore on the terms of his termination of employment. Issues which were raised with Dr Moore were that the relationship between Dr Moore and the General Manager of the company was not of the best and further the person whose position would be saved if Dr Moore left was a person of colour and his succession to Dr Moore's position would enhance the Respondent's black empowerment and affirmative action position.

22. The evidence was that Dr Moore elected to have his termination of employment presented as part of the retrenchment procedure as a face saving device and that Dr Moore's termination of employment was not a retrenchment but rather an agreed termination of employment, the terms thereof having been negotiated and agreed on between the parties.

23. Dr Moore's attitude was that, as there was no reason for him to be retrenched, he would only be willing to leave if the Respondent met certain conditions. He was not willing to accept anything less than what he had demanded. Miss Grace testified that the only way the Respondent could get Dr Moore to leave was to accordingly accept these demands.

24. With Messrs Brink and Bagg, the uncontroverted evidence was that Miss Grace had made an error in respect of the payment the Respondent should have made to them in respect of their motor vehicles when they were

retrenched and when this error was discovered, it was decided to rather give these two gentlemen the benefit of the error rather than to require them to pay back the money which had been paid over to them by mistake.

25. The Respondent's evidence was that, if medical aid payments for life were offered to other retrenched employees, it would have resulted in an enormous cost to the Respondent. She testified that the Respondent never entertained such a possibility.

26. Some controversy arose as to whether the Applicant had pertinently raised his complaints regarding the different treatment of Dr Moore and Messrs Brink and Bagg with the Respondent. Miss Grace was firmly of the view that, had the Applicant raised Messrs Brink and Bagg, she would have advised him that they were paid in error. Likewise, she testified that, if Dr Moore's different treatment had been raised by the Applicant, she was firmly of the view that she would have told the Applicant that Dr Moore was not retrenched, but his services terminated by agreement and without the Respondent having had cause for such termination. In the event, the determination of this dispute of fact is not relevant in respect of the merits of this matter in light of the conclusions I arrived at thereon. This aspect of the matter has a bearing on the costs order herein and I will deal with it later in that context.

27. The Applicant conceded in cross-examination that the Respondent's retrenchment package was a very liberal one. I believe his complaint essentially was that he requested and demanded to be treated the same as Dr Moore and Messrs Brink and Bagg in regard to paying his medical aid for as long as he lives (which the Respondent agreed to do in respect of Dr Moore) and the full settlement of his motor vehicle allowances (which the Respondent had agreed to in respect of all three of these employees).

28. The Applicant's further complaint was that no reasonable, just or fair explanation had been proffered by the Respondent for differentiating in the treatment of the Applicant and the three mentioned employees.

29. Accordingly, the Applicant was of the view that the failure or unwillingness of

the Respondent to make the same offers to him that it had made to Dr Moore and Messrs Brink and Bagg, constituted unfair treatment and a violation or breach of the Applicant's right to fair labour practices.

30. In his statement of case as well as through Mr Jooste, who represented the Applicant, the Applicant held the view that the stated alleged unfair conduct did not fall, or cannot be brought under or within any of the acts or omissions provided for in Section 186(2) of the LRA. It was for this reason that the Applicant argued that this Court should hear the matter in terms of Section 157(2)(a) of the LRA, alternatively, in terms of Section 77(3) of the BCEA.

31. The parties recorded "**the issues that the Court has to decide**" in the following terms in the pre-trial minute handed up to me:

"*a. Assuming the facts as alleged by the Applicant are proven or are accepted as proven, does the conduct of Respondent amount to an unfair labour practice as per Section 36(1) of the Constitution?*

b. Assuming the facts proven as alleged by the Applicant and assuming same constitute an unfair labour practice as provided for in Section 36(1) of the Constitution, but same do not fall within an unfair labour practice as defined in Section 186(2) of the LRA, does the Applicant have any remedy in law and does the Labour Court have jurisdiction to grant such remedy.

c. It is the Applicant's case that the Respondent's conduct amounts to an unfair labour practice but one that does not fall within the definition thereof as contained in Section 186(2) of the LRA.

d. It is the Respondent's case that as "unfair labour practice" is defined in Section 186(2) of the Labour Relations Act, 1995 and as Applicant states that the conduct complained of does not constitute an unfair labour practice as defined in Section 186(2), the Applicant's statement of case does not disclose a cause of action.

e. *Alternatively, should the Court find that the conduct does constitute an unfair labour practice, Section 191 of the LRA requires that a dispute must be referred for conciliation or arbitration and as this was not done the Court has no jurisdiction to hear the matter.*"

32. I assume the reference in paragraphs (a) and (b) to Section 36(1) of the Constitution is erroneous. Sections 23(1) and 38 of the Constitution apply herein.

33. I intend determining the issues herein by approaching the matter by first posing the question whether, on the facts that I find to apply herein, does the conduct of the Respondent constitute an unfair dismissal or an unfair labour practice in terms of Chapter VIII of the LRA.

34. If the answer to the aforementioned question is in the negative, I intend considering whether the Applicant has any other appropriate relief in law and whether the Labour Court has jurisdiction to grant such relief. In this process, I will decide whether, on the facts, the conduct of the Respondent possibly constituted a breach of the Applicant's rights in terms of Section 23(1) of the Constitution read with Section 38 of the Constitution, and if so, do I have jurisdiction to grant any relief to the Applicant.

35. Having regard to the Applicant's statement of case and to the evidence he adduced before me, it is quite clear that what the Applicant feels aggrieved about is that Dr Moore held a director’s position similar to the Applicant and he was only a year older than the Applicant. Yet the Respondent agreed to continue paying Dr Moore's medical aid contributions for the remainder of Dr Moore's life on Dr Moore being retrenched whilst, during the very same retrenchment exercise the Respondent refused to extend the same benefit to the Applicant without there being any grounds to so differentiate between them.

36. Secondly, it is apparent that the Applicant feels further aggrieved about the fact that the Respondent settled the whole or full amounts outstanding on the

motor vehicles of Messrs Brink and Bagg, when they were retrenched in an earlier exercise. Further, in the same vein, the Applicant feels aggrieved that likewise, the Respondent agreed to settle the whole or full amount outstanding on Dr Moore's motor vehicle when he was retrenched at the same time that the Applicant was.

37. The Applicant indicates in his statement of case that he requested and demanded to be treated the same as the aforementioned employees in regard to both his medical aid and the settlement of his motor vehicle allowance. The Respondent refused this request and/or demand. Again, so the Applicant argued, there were no grounds to so differentiate between them and his right to fair labour practice had been breached.

38. The Applicant proceeds to complain that no reasonable, just or fair explanation had been proffered by the Respondent for so differentiating in its treatment of the Applicant and the mentioned other retrenchees.

39. The Applicant accordingly contended that "*the failure or non-willingness of the Respondent in the circumstances to make the same offers as (he) refer(s) to above*" to him, constituted unfair treatment and a violation or breach of the Applicant's right to fair labour practices.

40. The Applicant, in his statement of case, and through his legal representative, Mr Jooste, before me contended that, as the mentioned unfair conduct of the Respondent did not fall or could not be brought under or within any of the acts or omissions provided for in Section 186(2) of the LRA, the Applicant had not referred the dispute to the Commission for Conciliation, Mediation and Arbitration.

41. The Applicant did, however, contend that, as the conduct complained of nevertheless constituted a breach of his right to fair labour practices, the conduct complained of constituted a breach of his Constitutional right in terms of Section 23(1) of the Constitution which stipulates that "*Everyone has the right to fair labour practices*." Accordingly, so the Applicant contended, this Court has jurisdiction to hear the matter in terms of Section 157(2)(a) of the

LRA, alternatively, in terms of Section 77(3) of the BCEA.

42. During the proceedings I asked Mr Jooste whether the conduct complained of could not conceivably be brought under Section 189 of the LRA. He was of the view that that was also not possible.

43. Mr Freund, acting on behalf of the Respondent, made common cause with Mr Jooste's proposition on behalf of the Applicant that neither Section 186(2) nor Section 189 of the LRA could find application based on the facts herein, which were to a large extent common cause between the parties.

44. As indicated earlier, I intend casting the net wider than the mentioned sections to include the whole of Chapter VIII of the LRA. The question which I accordingly turn to first deal with is, if I were to accept that Dr Moore was being treated far more generously than the Applicant in respect of his medical aid contributions being paid for life by the Respondent and if I were further to find that Messrs Brink, Bagg and Dr Moore's treatment by the Respondent in respect of the settlement of their motor vehicles was also very different to the treatment of the Applicant, could that conceivably constitute a breach of Chapter VIII of the LRA.

45. Mr Freund argued before me that the LRA does not provide that the employer is under a duty to give employees the same severance benefits when retrenching them. With reference to Mr Jooste's proposition that the Applicant had a legal right to be treated identically to Dr Moore and Messrs Brink and Bagg, Mr Freund proposed that that was not our law and he asked me to carefully consider the implications of such submission. He used the example of an employer who wants to hire airline pilots under circumstances where there is a severe shortage of pilots. The employer agrees to pay a number of pilots R1 million for a particular period of time. Once the shortage of pilots had been addressed, Mr Freund's proposition was that the pilots then knocking on the employer's door could certainly not argue that they were entitled to be paid the same as the pilots who were hired under circumstances where a shortage of pilots existed and the airline was in desperate need of

their services. A question of supply and demand determining the price, I suppose.

46. Mr Freund proceeded to argue that the law does not regulate the substantive entitlement employees may have to remuneration. Market forces are there to determine this. If I understood his argument correctly, by extension, the same applied to the retrenchment benefits to which employees who are retrenched are entitled. The law does not dictate that it must be the same, so Mr Freund proposed.

47. Interesting as these propositions may be, they were possibly made with only Section 189 of the LRA in mind. The proposition, I believe, ignores the rest of Chapter VIII of the LRA. I do not believe that the proposition in any event applies to the circumstances under consideration. I am unable to agree with Mr Freund, if his general proposition is that, in a retrenchment exercise, the employer is at liberty to provide the employees retrenched with different benefits and compensation because the LRA does not regulate the substantive entitlement of various retrenched employees.

48. I am of the view that, had the Applicant succeeded in showing that in a retrenchment shortly before his, the employer had under similar circumstances treated employees of similar rank far more generously, and further that, during the same retrenchment exercise, the employer had paid another employee a vastly more favourable retrenchment package than him, and no objective reasons could be shown by the Respondent for this vastly different treatment of the respective employees whom it retrenched, that may, I believe, amount to conduct which falls foul of Chapter VIII of the LRA. If it amounts to unjustified differentiation or to unfair discrimination, it may, simply put, in my opinion, amount to an unfair dismissal in terms of Section 185 of the LRA, there being no objectively fair grounds for the employer to have treated employees so vastly differently where their dismissals were all by reason of no fault on the employees' part.

49. This being my view, I turn to assess the present facts to determine whether it

breaches any part of Chapter VIII of the LRA.

50. In this matter, in respect of the fact that the Respondent had admittedly treated Messrs Brink and Bagg far more favourably in respect of the settlement of the outstanding amounts on their motor vehicles, the Respondent's undisputed evidence was that it had made an error in the settlement of these two gentlemen's outstanding amounts on their motor vehicles. The uncontested evidence was further that, on discovery of this error, having weighed up the pros and cons of correcting the error, and accordingly recovering the money from the two individual employees concerned, the Respondent's senior management decided rather to let it be. I do not find this a sufficient ground for the Applicant to complain that there was unjustified differentiation or any unfair discrimination in any of the Respondent's employment practices. I am satisfied that reasonable grounds existed for this differentiation between the employees who were dismissed for operational reasons..

51. Turning to deal with Dr Moore, the uncontested evidence of the Respondent was that, in Dr Moore's case, based on the objective factors and criteria, which it applied during the retrenchment process, the Respondent had no legal right or ground to terminate his employment.

52. The Respondent further adduced evidence that there were very practical reasons for it wanting to terminate Dr Moore's services. In this regard, the Respondent adduced evidence of a conflict in style existing at senior management level as well as the fact that Dr Moore's replacement would advance the Respondent's employment equity and affirmative action objectives. None of these, however, provided lawful grounds for terminating Dr Moore's employment by reason of the Respondent's operational requirements (or on any other recognised ground for termination) and both the Respondent and Dr Moore recognised this. Dr Moore accordingly held a very strong bargaining hand and understandably made very high demands. It can be said to amount to a situation where he said to his employer something to the effect, "*You have no grounds to terminate my employment. However, I am*

prepared to go if you meet my demands in respect of my medical aid contributions being paid by the company for the rest of my life and paying the whole of the outstanding balance on my car." The Respondent was prepared to meet these demands.

53. Mr Freund argued, correctly I believe, that there is no principle in our law prohibiting termination of an employee's services by agreement and with the employer paying a high price to do so. This amounts, so to speak, to "*buying*" the employee's agreement to terminate his services under circumstances where the employer has no legal grounds to do so. The bargaining power and the desire to terminate an employee's services (which can be equated to "the market forces") will then determine "the price" and will normally not set a binding precedent which the employer must follow later.

54. As said earlier, the Respondent's evidence was to the effect that Dr Moore's termination was not part of the retrenchment, but at his request, and in order to facilitate his exit in the least embarrassing manner, the Respondent and Dr Moore in effect agreed to clothe the agreed separation as having been part of the retrenchment exercise which the Respondent had embarked on. This evidence of the Respondent was not gainsaid.

55. I am accordingly also satisfied that Dr Moore's case is distinguishable from that of the Applicant's and that his treatment also does not amount to unjustified differentiation or unfair discrimination in any sense whatsoever. This is perhaps more on all fours with Mr Freund's pilot example. The employee in this case had a strong bargaining chip and the employer wanted to "get rid" of the employee, but could only do so at a price. Other employees who did not have the same bargaining leverage could not then demand similar treatment.

56. As stated earlier, the parties made it common cause between them that, on the facts of this matter, Section 186(2) of the LRA did not apply. I agree with this part of the common cause conclusions of the parties.

57. Likewise the parties made it common cause between them that Section 189 of

the LRA did not apply. I reluctantly tend to agree with this part of the common cause conclusions. However that is not the end of the debate, I believe.

58. Whilst I have now concluded that, on the facts presented to me, the conduct of the Respondent does not amount to a breach of Chapter VIII of the LRA I do not share Mr Freund's view, if I understood him correctly, that an employer is at liberty to pay various employees of the same standing and service varying retrenchment packages and that such conduct will not amount to an unfair labour practice of any nature because the LRA does not provide that the employer is under a duty to give employees the same severance benefits when retrenching them. If the Respondent were not able to satisfy me that there was good cause for the different treatment of the respective employees in the retrenchment exercises it had embarked on, I may very well have found that the dismissal was not a fair labour practice in terms of Chapter VIII of the LRA and as stated, in particular as such dismissal would in my mind not be fair as is required by Section 185 of the LRA.

59. In making the aforementioned statement, I was conscious of the following statement of Ngcobo J made in National Education Health and Allied Workers Union v UCT 2003(3) SA 1 CC at page 19 B – E:

> " *The concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgement. It is therefore neither necessary nor desirable to define this concept.*
>
> *The concept of fair labour practice must be given content by the Legislature and thereafter left to gather meaning, in the first instance, from the decisions of the specialist tribunals including the LAC and the Labour Court. These Courts and tribunals are responsible for overseeing the interpretation and application of the LRA, a statute which was enacted to give effect to Section 23(1) of the Constitution. In*

giving content to this concept the Courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity-based jurisprudence generated by the unfair labour practice provision of the 1956 Labour Relations Act as well as the codification of unfair labour practice in the LRA…"

60. As I have already concluded that, on the facts before me, I am satisfied that the Respondent did not make itself guilty of an unfair labour practice, or putting it differently, did not breach the Applicant's right to fair labour practices, nor was the Applicant's dismissal unfair, I do not intend developing this particular argument any further.

61. I accordingly turn to deal with the question whether, in light of the fact that the Applicant stated in its statement of case that the mentioned unfair conduct of the Respondent did not fall or could not be brought under or within any of the acts or omissions provided for in Section 186(2), whether the Applicant's statement of case indeed did not disclose a cause of action.

62. With the Applicant relying on Section 23(1) of the Constitution as the basis for his cause of action, the question is whether a party can approach this (or any other competent) Court relying only on a breach of Section 23(1) of the Constitution. If the answer to this is in the affirmative, then the Applicant's statement of case did at least disclose a cause of action. If the answer is negative, then his statement did not disclosed such cause.

63. A question that does also arise is whether the Applicant was at all entitled to approach this Court, as it did, without referring a dispute to the CCMA but to approach this Court directly.

64. Before attempting to answer these questions, one must bear in mind that in the present case the Applicant, acting on legal advice, approached this Court on the basis that he could not find relief in terms of Section 186(2) of the LRA. In Court, in response to a question by myself, Mr Jooste also contended that the Applicant could not bring this matter in terms of Section 189 of the LRA.

As stated, Mr Freund agreed with both these propositions of Mr Jooste.

65. In considering these issues, I had regard for what Landman J had the to say in National Entitled Workers Union v Commission for Conciliation, Mediation and Arbitration & Others (2003) 24 ILJ 2335 (LC) at 2340 E – G.

66. *"Although item 2 of Schedule 7 does not embrace the commission of an unfair labour practice by an employee against an employer this does not mean that the item, which has been repealed, is unconstitutional. In my opinion it means no more than that the LRA, in this instance, does not give effect to Section 23 of the Constitution. Logically the LRA should be the home of the prohibition on an unfair labour practice committed by an employee. A principle purpose of the LRA is 'to give effect to and regulate the fundamental rights conferred by Section 27 of the Constitution'. See Section 1 of the LRA. The reference to Section 27 of the Constitution of the Republic of South Africa 1993 is to be read as a reference to Section 23 of the present Constitution. The LRA is not intended to regulate exhaustively the entire concept of a fair labour practice as contemplated in the Constitution 1993 nor the present Constitution. The field is far too wide to be contemplated by a single statute."*

67. In considering whether the Applicant in the NEWU matter (supra) could bring his application to the Labour Court in terms of Section 23 of the Constitution, Landman J (at 2340 H – I) indicated that NEWU had a number of remedies available to it such as seeking an interdict in the form of a mandamus compelling the employee to adhere to the terms of the contract or it could have sued the employee for 3 months' salary in lieu of notice. Landman J then said the following at 2340 I - J:

"*Should NEWU wish to prohibit a labour practice which is unfair and which is not regulated by a conventional statute NEWU may approach a Court of competent jurisdiction relying on Section 23 of the Constitution to grant the relief which it seeks. This would not contribute*

to two parallel streams of labour law which, as remarked in NAPTOSA and Others v Minister of Education, Western Cape and Others 2001(2) SA 112 (C); (2001) 22 ILJ 889 (C), would be 'singularly inappropriate'."

68. The NAPTOSA case concerned the appropriateness or otherwise of granting relief directly under Section 23(1) of the Constitution without a complaint that the LRA was constitutionally deficient in the remedy it provides.

69. Mr Freund argued that, in the event of the LRA regulating a particular matter, then it is not open to a party to approach this, or any other Court, directly in terms of Section 23 of the Constitution. The party will then first have to attack the constitutionality of the Section or Sections of the LRA as being unconstitutional.

70. I believe this is simply the converse of what Landman J had in mind with his statement to the effect that if a party wishes to prohibit a labour practice "*which is unfair and which is not regulated by a conventional statute*" then it may approach a Court of competent jurisdiction relying on Section 23 of the Constitution. I agree with this proposition.

71. In the NAPTOSA matter, Conradie J, with reference to Fose v Minister of Safety and Security 1997(3) SA 786 (CC); (1997) (7 BCLR 851) stated the following at 121 D:

72. "*It is clear from this decision of the Constitutional Court that there may be circumstances where a litigant against the State would be entitled to rely directly on a breach of a fundamental right. Whether this would be permissible would depend, however, on the availability of 'appropriate relief'.*"

73. It is apparent from the comments of Conradie J in the NAPTOSA case that he could not conceive that it is permissible for an Applicant, save by attacking the constitutionality of the LRA, to go beyond the regulatory framework which it establishes. (See page 123 I - J). This view of Conradie J, I believe, is based on his earlier proposition (at page 122 D – E) that:

> "*If an employer adopts a labour practice which is thought to be unfair, an aggrieved employee would in the first instance be obliged to seek a remedy under the LRA. If he or she finds no remedy under that Act, the LRA might come under constitutional scrutiny for not giving adequate protection to a constitutional right. If a labour practice permitted by the LRA is not fair, a Court might be persuaded to strike down the impugned provision. But it would, I think, need a good deal of persuasion.*"

74. I do agree with Conradie J that it is inconceivable for an Applicant to go beyond the regulatory framework of the LRA, save by attacking the constitutionality of the Act.

75. However, at the same time, I do not believe that Conradie J's comments in the NAPTOSA decision mean that an Applicant may only approach a Court in a labour dispute by means of attacking the constitutionality of a particular section of the LRA either because it permits a labour practice which is not fair or that it does not regulate a particular practice as being unfair.

76. I do believe that the position is as indicated by the Constitutional Court itself (in the Fose matter) namely that there may be circumstances where a litigant would be entitled to rely directly on a breach of a fundamental right but that this would depend on the availability of "*appropriate relief*". I understand this to mean that in the event that a litigant thinks a particular labour practice is unfair, yet cannot bring himself within the framework of the LRA, that litigant may approach this Court directly under Section 23 of the Constitution.

77. I am accordingly of the view that, only in the event of a litigant persuading a Court that the LRA does not regulate a particular matter, and that the conduct complained of does amount to a breach of that litigant's constitutional right to fair labour practices, will there be a cause of action and if proven, will the Court come to the assistance of that particular litigant.

78. Applying this proposition to the present case before me, as stated, I do believe that the Applicant's complaint herein in essence amounts to him complaining

that his employer, during a retrenchment process in terms of Section 189, unfairly differentiated and/or discriminated against him in respect of the severance benefits granted to other employees and not to him and that his dismissal was accordingly unfair.

79. As stated earlier, I am of the view that appropriate relief may have been available to the Applicant in terms of Chapter VIII of the LRA (in particular Section 185 thereof) had the Applicant succeeded in proving improper differentiation and/or unfair discrimination at the time of the termination of his employment for operational reasons. As stated, I am of the view that he may have been successful to show that his dismissal was unfair by reason of his employer having improperly and unfairly differentiated and/or discriminated against him by paying other employees substantially different severance pay to that which they paid him without their being proper, fair and rational reasons for such differentiation.

1. If I am wrong in my conclusion that the Applicant may under certain circumstances have succeeded under Chapter VIII of the LRA, because that Chapter does not regulate and/or outlaw the conduct which the Applicant herein feels aggrieved about, I am of the view that, if the Respondent's conduct complained of was not satisfactorily explained (as I have found it did herein) but its conduct was tainted by unfair and/or improper and/or unreasonable and/or irrational differentiation or discrimination between similar employees, I would then nevertheless have come to the assistance of the Applicant under Section 23(1) of the Constitution.

80. However, I am satisfied that on the facts of the matter before me the Respondent did not fall foul of either Chapter VIII of the LRA or of Section 23(1) of the Constitution.

81. There are accordingly a number of grounds for the Applicant's application to fail. I am of the view that this application ought to have been brought in terms of Chapter VIII of the LRA. It follows that the Applicant also in my view ought to have referred the dispute to the CCMA and only thereafter should he have proceeded to trial. Nothing precluded the Applicant from declaring a dispute under Chapter VIII of the LRA, and because of the uncertainty surrounding the remedies available to address his dispute, in the alternative, to have relied on Section 23(1) of the Constitution.

82. It follows that in part, because I am of the view that the Applicant ought to have approached this court under Chapter VIII of the LRA that his statement of claim did not disclose a cause of action. To the extent that he should (and could) bring his case under Section 23(1) of the Constitution, it did disclose a cause of action.

83. As stated, in the end, if I am wrong in my proposition that the Applicant ought to have proceeded under Chapter VIII of the LRA, then I believe the Applicant has followed the correct procedures by approaching this (or any other competent) Court in terms of Section 23(1) of the Constitution, as he had no other remedy under the LRA. Under these circumstances, as stated, his statement of claim did disclose a cause of action.

84. I am however of the view that, on the facts of the case, he would nevertheless also have failed under Section 23(1) of the Constitution for the reasons stated.

85. Turning to deal with the issue of costs, Mr Freund argued that there is no reason why costs should not follow the cause. In support of this proposition he argued that the point of law had been clearly identified and that it did not matter what the facts herein were found to be, the Applicant still did not have a case in law. (I assume this being with reference to the fact that the Applicant's statement of case did not disclose a cause of action and/or that it was wrongly brought in terms of Section 23 of the Constitution.) Mr Freund’s argument in support of me granting the Respondent costs is clearly also based on the proposition that, as I now have found, that whichever way one approaches the Applicant's case, it would have failed in any event. There is merit in that argument.

86. Unsurprisingly, Mr Jooste, on the other hand, argued that if the Applicant was successful, he should be awarded costs, but if he is unsuccessful, he should not be mulcted with costs as he had good cause to feel done-in. It is in this regard that I have a degree of sympathy for the Applicant. Clearly Messrs Brink and Bagg were treated more favourably than the Applicant was in respect of the settlement of the outstanding amounts on their motor vehicles.

The same applies to Dr Moore who, in addition to his more favourable treatment in respect of his motor vehicle, received vastly more favourable treatment from the Respondent in respect of his medical aid than the Applicant did whose services were terminated by reason of no fault of his.

87. Now it is not this more favourable treatment that inclines me to have some sympathy with the Applicant. I am satisfied, based on the papers served and the evidence adduced before me, that the Respondent did not as fully disclose the reasons for this differential treatment of the other employees to that of the Applicant as it reasonably should or could have done, either during the consultation process leading up to the Applicant's retrenchment or during the negotiations afterwards between the parties in an effort to settle this matter. Particularly as far as the very different treatment of Dr Moore is concerned, I am sure that had the Respondent so openly and candidly stated the reasons for the differentiation to the Applicant during this period of time as it did in Court before me, the Applicant may have better understood and accepted the position or may very well have received different legal advice.

2. Miss Grace testified that, had the Applicant raised the cases of these three employees specifically, she would have given the reasons testified about before me. That perhaps begs the question. The Respondent cannot genuinely content that it did not know what exactly it was that the Applicant was so unhappy about. Miss grace was certain that he did not raise the specific reasons for his unhappiness. On her evidence, the respondent did not, during the consultation or negotiations with the Applicant provide the reasons for the different treatment of the other three employees. I believe that puts a good deal of blame for this unfortunate case squarely on the Respondent. In any event, the Applicant's complaints were clearly stated in his statement of claim. Whilst the Respondent did refer to the fact that the treatment of Messrs Brink and Bagg was based on an error, it certainly did not at all spell out the reasons for Dr Moore's vastly different treatment in the clear terms it did before me. Instead, it seems to still have hidden behind the secrecy clause in the settlement agreement with Dr Moore. I also find that unacceptable.

88. Whilst it is understandable that the Respondent felt it necessary to have confidentiality clauses in the agreements relevant herein, as stated, I do not believe the Respondent was at various stages candid enough with the Applicant in dealing with the reasons for his belief that he was unfairly treated in light of the way the other three employees were treated by the Respondent,

and as said, particularly the reasons for Dr Moore being treated so vastly different than the Applicant.

89. Under the circumstances I accordingly make the following order:

a. The application is dismissed.

b. There is no order as to costs.

NEL AJ

Date of hearing: 29 August 2005

Date of judgment: 10 February 2006

Appearances:

For the Applicant: Adv P J Jooste

Instructed by: Bouwer Cardona Inc

For the Respondent: Adv A Freund

Instructed by: P G Bam Attorney