IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: **JS 14/05**

In the matter between:

JOHN VINEY **APPLICANT**

AND

BARNARD JACOBS MELLET SECURITIES (PTY) RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

1] The issue for determination in this matter is whether the applicant's dismissal was automatically unfair in that it was as a result of a transfer as a going concern in terms of s197 of the Labour Relations Act 66 of 1996 ("the LRA") and thus contravened s187(1) (g) of the LRA. The alternative prayer is whether the dismissal was substantively and procedurally unfair in terms s189 of the LRA.

2] The respondent opposed the applicant's claim and contended that the dismissal was not related to the transfer as a going concern but was due to operational reasons and was effected in a fair manner in terms of the provisions of s189 of the LRA.

Background facts

3] The applicant commenced working for Mazwai Securities & Co (Pty) Ltd ("Mazwai Securities") on 1st August 2002, as the head of a fixed income desk. Mazwai Securities at that stage had three shareholders, namely, Mr Andile Mazwai and Ms Phumzile Langeni who both owned 51 % of the shares, and Barnard Jacobs Mellet Holdings Ltd ("BJMH"), a listed company on the Johannesburg Stock Exchange ("JSE"), owned the remaining 49% shares.

4] Mazwai Securities and BJMH concluded a black economic empowerment ("BEE") transaction during August 2003, in terms of which, BJMH acquired the 51% shares in Mazwai Securities. Consequent to this transaction Mazwai Securities became a wholly-owned subsidiary of BJMH. A further consequence of the BEE transaction was that Mazwai

Securities and the respondent, namely Barnard Jacobs Mellet Securities (Pty) Ltd ("BJMS"), which is a wholly owned subsidiary of BJMH merged.

5] The transaction between the Mazwai consortium and BJMH was subject to approval by the JSE, the Competition Commission and the respective shareholders of BJMH and Mazwai Securities. However, even before these conditions were fulfilled, the employees of Mazwai Securities moved over to BJMS on 1st August 2003.

6] The approval by both the JSE and the Competition Commission took place during December 2003. The shareholders approved the transaction on 22nd January 2004. Following the approval, Mr. Mazwai was appointed as CEO of BJMS and Co-CEO of BJMH on 23rd January 2004, and the pay-slips of the former employees of Mazwai Securities were also changed to reflect that their employer was BJMS during the same period.

7] The applicant commenced working at the fixed income desk of BJMS also known as the "*bond desk*" on the 1st August 2003.

The income desk was responsible for trading in bonds. With the incorporation and arrival of the applicant, the number of the bond traders at BJMS increased from 5 (five) to 6 (six) employees.

8] The final agreement, in respect of which 10% of BJMH's shares were sold to the Mazwai Consortium, was signed on 17th November 2003. Apparently, the parties agreed that irrespective of when these conditions were fulfilled, the transaction would be back-dated, and therefore made retrospective, to 1st August 2003.

9] It is common cause that subsequent to the merger BJMS was automatically substituted in the place of Mazwai Securities as the employer of the applicant in terms of s197 of the LRA.

10] During February 2004, the executive committee of BJMS resolved to reduce the number of employees at the bond desk from 6 (six) to 5 (five). In other words BJMS reverted back to the number it had prior to the merger. The three reasons for the retrenchment according to the respondent were: (a) the general decline in the bond market; (b) the fact that there was

a decline in the revenue generated by BJMS' bond desk, which was a result of the general decline in the bond market; and (c) the fact that the bond desk no longer showed a 15% profit over capital.

11] Mr Mazwai testified that when the committee took the decision to retrench the applicant during February 2004, nothing new had happened and the committee decided that LIFO would be a fair selection criterion. Because of his short service which, included the period that he served with Mazwai Securities, the applicant was identified as the person with the shortest service period in the bond market and was for this reason selected for retrenchment. Mr Mazwai further testified that the applicant should have been aware of the economic situation because it was regularly discussed at the bond desk.

12] On the 25th February 2004, the applicant received a letter from Mr Wilson informing him that:

> "The company has, as a result of Restructuring/ Meger, embarked on, amongst others, consultation process with regards to the above issue.
>
> *This notice is given in compliance with the Labour Relations Act –Act 66 of 1995 (as amended), section 189."*

13] It is common cause that the applicant was the only employee who received the letter and this was the first time that he was informed of the retrenchment. The letter also invited the applicant to a meeting for the 26th February 2004.

The first consultation meeting

14] At the first consultation meeting, on 26 February 2004, Mr Lionel Wilson, the Chief Financial Officer who represented BJMS, informed the applicant that following the merger there were too many people at the bond desk, the desk was not *"performing well"* and that him being the *"last he was the first out."*

15] Thereafter, Mr. Wilson offered the applicant a severance package of 6 (six) weeks and that if he was to sign immediately the severance package would be *"sweetened."*

16] The applicant testified that Mr. Wilson did not expand on the statement that the bond desk was not *"performing well."* After

several questions from the applicant, Mr. Wilson threatened the applicant by telling him that for every day that he did not accept the severance package, one day of his annual leave would be deducted.

17] The applicant further testified that after declining the offer, Mr. Breedt read from a book he had. Under cross examination the respondent sought to have the applicant admit that what was read to him was the provisions of s189 of the LRA.

18] At the end of the reading by Mr. Breedt, the applicant requested an opportunity to contact his attorney. The opportunity was granted and both Mr. Wilson and Mr. Breedt left the room for the applicant to phone. On their return and after the applicant had completed his telephone call, Mr. Wilson informed the applicant that he was immediately to go on the *"garden leave"* and that he should collect all his belongings from his desk. He further informed him that he was not allowed to speak to the *"market, the clients of BJMS and the staff."* In essence the *"garden leave"* is suspension with pay.

19] The applicant was then accompanied from the board room to his desk where he collected his belongings. On his way out of the building, Mr. Wilison who was seeing the applicant out informed him that he was very sorry as this had happened also to his farther, who after the retrenchment was never able to find employment.

20] The reason for placing the applicant on what is called the "garden leave" and requiring him not to speak to the clients of the respondent, according to Mr. Mazwai, was because BJMS feared that the stay of the applicant after being informed of his retrenchment might demoralize the other employees and disrupt the operations at the bond desk. The other reason was that if the applicant remained during the retrenchment process, information about the process may go out and reach the market which may then prejudice the respondent.

21] In order to avoid any retrenchment suspicion the employees at the bond desk were informed that the applicant was on leave and that they should pass the same message when the clients were to phone looking for him.

Second meeting

22] The applicant testified that the second meeting was scheduled on 18 March 2004, but was told only on his arrival that the meeting was cancelled. The meeting was then scheduled for 21st April 2004. Prior to this meeting on the 20 April 2004, the applicant's attorney, Mr. Hinds faxed a letter to the respondent requesting the minutes of the first meeting. This meeting which was chaired by Mr. Venter of CEOSA, and attended by Mr. Mazwai, Mr. Wilson and Ms De Villiers, the respondent's secretary.

23] The minutes of the meeting reveals the applicant having enquired as to why he had been selected for retrenchment. He enquired as to whether it was because of his age, his colour or his performance that he was selected for retrenchment. Both Mr. Mazwai and Mr. Venter confirmed that the applicant did ask these questions.

24] In addition to confirming most of what was said at the first meeting, Mr. Venter repeated what was said by Mr. Wilson at that meeting that the reason for the retrenchment was due to the merger and also that there were too many people at the bond desk.

25] The applicant testified that in response he referred the meeting to his good performance during December 2003/ January 2004. He further testified that he was informed by a friend at Investec Bank that he had passed for him a R98 000-00 commission which was the highest.

26] In response, Mr. Mazwai, informed the applicant that the revenue that he generated did not justify his employment. The applicant then enquired about the new appointments at the private client services ("PCS"). The applicant was informed that he did not qualify for the appointment in this division.

27] The outcome of this meeting was that the applicant still remained on the *"garden leave"* and was advised that a further meeting which could possibly be the last would be set up.

The third meeting

28] At the third meeting held on the 27th May 2004, the applicant questioned why at the first meeting he was told that the reason for his retrenchment was because of there being too many people at the bond desk whereas at the second meeting

he was told that the reason was that the commission he generated did not justify his employment.

29] The applicant also enquired about the financial figures pertaining to the bond desk performance. Mr. Mazwai informed the applicant that the respondent could not furnish the financial information to either the applicant or his attorney as such disclosure would amount to a contravention of the Insider Trading Act 135 of 1998.

30] The meeting then discussed the alternative position in the equity desk. Mr. Mazwai informed the applicant that he did not have the necessary skills for the position and therefore did not qualify.

31] As concerning the disclosure of information relating to the performance of the bond desk, the applicant was informed that he could come the following day to appraise himself of the performance of the bond desk and the client relations. The applicant's attorneys were also advised of the same in a letter dispatched to them on the same day.

Fourth meeting

32] The applicant testified that contrary to the promise which was made the previous day he was not provided with a copy of the financial statement nor was he allowed insight into the financial statement pertaining to the bond desk. He further testified that all what happened at this meeting was that Mr. Krynauw, one of the employees of the respondent at the bond desk read the names of the clients that the respondent was still speaking to. He also indicated the commission that the respondent was generating from these clients.

33] On 31st May 2004, the applicant collected his letter of dismissal from the respondent. The applicant's attorneys then, on 2nd June 2004, addressed a letter to the respondent complaining amongst others about the non-disclosure of the financial report.

Automatically unfair dismissal

34] Section 187(1) (g) of the LRA provides that a dismissal is automatically unfair if the reason for the dismissal is a transfer, or a reason related to a transfer, contemplated in section 197

or 197A. Section 197 of the LRA reads as follows:

"***Transfer of contract of employment***

197.

(1)In this section and in section 197A-

(a) 'business' includes the whole or a part of any business, trade, undertaking or service; and

(b) 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.

(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)–

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

(d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer."

35] The term "*dismissal*" is defined in Section 186(1) (a) of the LRA

to include instances where an employer terminates a contract of employment with or without notice. Thus, "dismissal" includes a retrenchment.

36] The term "transfer" is defined in s197 (1) of the LRA as the "*transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.”*

37] In order to ascertain whether a dismissal constitutes an automatically unfair dismissal in terms of s187 of the LRA, one must ascertain the true reason for such a dismissal. See *Kroukam v SA Airlink (Pty) Ltd* [2005] 12 ILJ 2153 (LAC) at 2162F; .*NUMSA & Others v Driveline Technologies (Pty) Ltd & Another* 2000 ILJ 142 (LAC) at 152J; *SA Chemical Workers Union (SACWU) & Others v Afrox Ltd* 1999 ILJ 1718 (LAC) at 17260; *Van der Velde v Business Design Software (Pty) Ltd & Another* (2) 2006 ILJ 1738 (LC) at 1745 I; *Jabari v Telkom SA (Pty) Ltd* 2006 ILJ 1854 (LC) at 927A-B.

38] If the court finds that the reason fell within the parameters of s187 (1) (g), the dismissal is automatically unfair and the court must then determine the appropriate remedy. See in this

regard *Jabari v Telkom SA (Pty) Ltd*. 2006 ILJ 1854 (LC).

39] It is undisputed that the merger between Mazwai Securities and BJMS resulted in a transfer of the business as a going concern in terms of s197 of the LRA. Thus, the contracts of employment of all the employees of Mazwai Securities were transferred to BMJS on the same terms and conditions.

40] It may be appropriate at this stage to deal firstly with the issue of the effective date of the transfer. The respondent argued that the effective date of the transfer was 1st August 2003, in terms of the agreement between the parties. This agreement was according to the respondent further affirmed in the pre-trial minute. There seem to be nothing to this effect in the pre-trial minute. The respondent argued that the dismissal occurred some 7 (seven) months after the transfer.

41] The Court *Van der Velde v Business and Design Software (Pty) Ltd* (2006) 10 BLLR 995 (LC) had the opportunity to consider the issue of the effective date of the transfer, and held that the effective date of the transfer was the day on which the transaction is completed and the new employer takes

unencumbered transfer. The reasons for this approach are briefly; (a) the legal substitution of the contract - the new employer taking over the legal obligations of the old employer as a matter of law, (b) the right of the employees to know the identity of their employers - creating certainty for employees who may wish to enforce their employment rights, and (c) the inherent risk in allowing employer parties to fix the date of the transfer of business. See *Van der Velde* (at page 100-102).

42] In the present case, it is common cause that the suspensive conditions to the merger were fulfilled on 22nd January 2004. It was after the suspensive conditions were fulfilled that the pay slips of the applicant were changed to reflect BJMS as the employer and this also occurred during January 2004.

43] Thus, for the purpose of s197 the transfer of the applicant from Mazwai Securities to BJMS took place when the merger became unconditional on the 22 January 2004. The decision to retrench the applicant was therefore taken about three weeks thereafter.

44] I now proceed to deal with the inquiry to be conducted in

determining whether or not the dismissal is automatically unfair.

45] In the Labour Appeal Court, Zondo JP in dealing with unfair dismissal of an employee involving termination as a result of the trade union activities in the case of *Kroukam v SA Airlink (Pty) Ltd* 2005 ILJ 2153 (LAC) held that:

> "...there was ample evidence upon which the court a quo could and should have found the appellant's dismissal to have been dominantly or principally for prohibited reasons that rendered the dismissal automatically unfair."

46] The court further held that even if the reasons did not constitute the principal or dominant reason the dismissal would still have been automatically unfair if such reasons nevertheless played a significant role in the decision to dismiss.

47] Davis AJA, writing a separate judgment to that of Zondo JP but arriving at the same conclusion in *Kroukam* quoted with approval the decision in *SA Chemical Workers Union & others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) (at para 32), where Froneman DJP formulated the approach to be adopted in dealing with an automatically unfair dismissal in terms of s 187(1) (a) of the LRA as follows:

“The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual two-fold approach to causation, applied in other fields of law should not also be utilized here (compare S v Mokgethi & others 1990 (1) SA 32 (A) at 39D-41A; Minister of Police v Skosana 1977 (1) SA 31 (A) at 34). The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the "main" or ''dominant", or ''proximate", or ''most likely" cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare S v Mokgethi at 40). I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases. It is important to remember that at this stage the fairness of the dismissal is not yet an issue. . . . Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of s 187(1)(a) . If that probable inference cannot be drawn at this stage, the enquiry proceeds a step further.'”

48] The starting point in this inquiry according Davis AJA, is to determine whether the employee has produced sufficient evidence to raise a credible possibility that an automatically unfair dismissal has taken place. Having discharged the evidentiary burden of showing that the dismissal was for an impermissible reason, it is upon the employer to discharge its onus of proving as provided for in terms of s192 of the LRA that the dismissal was for a permissible reason as provided for in terms of s188 of the LRA.

49] The employee discharges his/her evidentiary burden by: (a) advancing evidence pertaining to the existence of the dismissal in terms of s192 (1) of the LRA; (b) showing that the transfer of the whole or part of the business was a going concern in terms of s197 and; (c) presenting evidence that points to a causal connection between the dismissal and the transfer.

50] Once the employee has discharged his or her evidentiary burden, the burden of proving that the reason for the dismissal was not for a prohibited reason rests with the employer. If the employer relies on a fair reason for the dismissal, the court

must apply the two- stage test of factual and legal causation to determine the true reason for the dismissal. See *Van der Velde* (supra).

51] All relevant facts and circumstances must be taken into account in conducting the objective test of determining the causal connection between the dismissal and the transfer as a going concern. And the enquiry into the factual causation entails answering the question; would the dismissal have taken place but for the transfer as a going concern-the *"but for"* test.

52] The legal causation is applied once the factual causation is satisfied. The legal causation is established through an objective test of determining whether the transfer is the *"main," "dominant," "prominent," "proximate likely cause" of the dismissal.* The relevant factors which are not necessarily determinative include the motive for the dismissal and the length of period between the dismissal and the transfer.

53] The proximity of the transfer and the dismissal is a factor that may point towards the causal link between the dismissal and the transfer. Even though the proximity of the dismissal does

not always establish a *prima facie* causal connection between the two, it will however as Van Niekerk AJ put it in *Van der Velde's case*; *"constitute credible evidence of causation."* The dismissal would have been related the transfer if the motive is to avoid the employer's obligations as set out in the s197 of the LRA.

54] If the employer succeeds in discharging its burden of showing that the dismissal was not automatically unfair but for operational requirements, then the provisions of s188 read with s189 of the LRA if pleaded would apply.

55] In applying the facts of this case to the law, it is common cause that the BEE transaction which resulted in the merger between Mazwai Securities and BJMS was concluded on 1st August 2003, by means of a memorandum of understanding. The merger was however subject to certain conditions, the last of which as mentioned above was complied with on 22nd January 2004.

56] The effective date in terms of the principle enunciated in *Van der Velde* was in this case during 22nd January 2004. It was

only after the fulfillment of the last condition that BJMS and Mazwai Securities unconditionally merged and the applicant became an employee in law of BJMS. The other factors that support the view that the transfer occurred in January are; the appointed of Mr. Mazwai as CEO of BJMS and Co-CEO of BJMH on 23rd January 2004 and the applicant's pay slips being changed to reflect BJMS as his employer. The annual report of the BJMH also makes reference to the conclusion of the BEE transaction as being during January 2004.

57] Thus, the decision to reduce the number of employees from six to five was taken three weeks after the effective date of the transfer as a going concern. It is important to note that the employees were reduced to the same number that had been employed by BJMS at its bond desk, prior to the merger.

58] I now proceed to deal with the question of whether the applicant has discharged his evidentiary burden. It is firstly, common cause that the applicant was dismissed for operational reasons soon after the merger between BJMS & Mazwai Securities. And secondly, as stated earlier the respondent addressed a letter dated 25 February 2004 to the

applicant where it was stated amongst others that the respondent has, as a result of the restructuring/merger, embarked on a consultation process regarding his possible retrenchment.

59] The same reason was communicated to the applicant by Mr. Wilson at the first consultation meeting. Mr. Wilson informed the applicant that following the merger there were too many people and the bond desk was not performing well. The same reason was repeated at the second meeting on the 21 April 2004.

60] Mr. Mazwai, when confronted by the applicant about the real reason for his retrenchment, stated that;*" there were too many people at the bond desk."*

61] In my view, regard being had to the above reasons, the applicant has in addition to the common cause facts relating to both the merger and his dismissal, advanced credible evidence to support the proposition that his dismissal and the transfer as a going concern are casually connected.

62] The above conclusion then leads me to the next stage in the inquiry, being that of determining whether the respondent has discharged the onus of showing that the dismissal is the one envisaged by s188 of the LRA. The first stage of inquiry entails an investigation into the existence of factual causation.

63] The respondent in applying the factual causation test argued that *"but for"* the merger the applicant would still have been dismissed by Mazwai Securities as it would have fallen insolvent by mid-2004 and would probably have stopped trading by then.

64] In essence the argument of the respondent is that even if the merger is removed from the equation, the applicant would still have been retrenched for operational reasons by mid-2004 because of the financial difficulties that confronted Mazwai Securities. It is on this basis that the respondent contended that there was no causal connection between the transfer and the dismissal.

65] I do not agree with this view. The question is whether there is a factual and legal causation between the transfer and the

dismissal. The approach proposed by the respondent would apply if the dismissal occurred before the effective date of the transfer.

66] Because the underlying purpose of s187 (1) (g) is to protect employees against job losses, the question has to be directed at the new employer who on the date of the transfer took responsibility of employment of the applicant. See *National Education Health & Allied Workers v University of Cape Town & Others* 2003 ILJ 95 (LC). The question to be asked to the respondent *(the new employer)* is would it have had to embark on a retrenchment exercise but for the transfer?

67] The probabilities strongly support the conclusion that but for the transfer the respondent would not have been faced with the retrenchment exercise. Before the merger, the respondent employed five people at the bond desk, and the number was increased to six after the transfer. After the retrenchment the respondent reverted back to employing five people at the bond desk.

68] The version of the applicant is that he was informed by Mr.

Wilson, that the reason for the retrenchment was that there were too many people at the bond desk. This version was not challenged and the respondent never called Mr. Wilson to testify. In any case this version is further supported by the minutes of the meeting held on 21 April 2004, wherein it is recorded amongst others that:

> "The reasons underlying the envisage (sic) dismissal was discussed, citing that the desk was not performing and was overstaffed following the merger between BJM and Mazwai."

This was confirmed by Mr. Venter, the labour consultant of the respondent and Mr. Mazwai during cross-examination. This is also consistent with what is stated in the letter of 25 February 2004 the contents of which are quoted earlier in this judgment.

69] The case of the respondent as stated earlier was not that BJMS would still have retrenched one of its employees at the bond desk even if the merger did not take place. Their case was that Mazwai securities would have retrenched even if the transfer had not taken place.

70] Thus, the strong case that has emerged from the totality of the

evidence is that BJMS would not have commenced with the retrenchment if the applicant had not joined the bond desk. This case is made even stronger by the testimony of Mr. Mazwai during cross-examination where he said that the BJMS executive had resolved during the middle of February 2004, that its bond desk could operate quite well without the presence of the applicant. In essence what this means is that if the merger did not happen, the applicant would not have joined the bond desk and the number of the employees would also not have increased from five to six and therefore BJMS would not have been confronted with a retrenchment exercise.

71] The respondent has accordingly failed to discharge its onus of showing that the dismissal was for a fair reason and was not in contravention of the provisions of s187 (1) (g) of the Act.

72] I am therefore of the view that the dismissal of the applicant was automatically unfair and was done in contravention of the provisions of s187 (1) (g) of the LRA.

The appropriate relief

73] The applicant does not seek reinstatement but the maximum compensation of 24 months.

74] The respondent contended that in assessing compensation the court should take into account the fact that the applicant was employed within 3 (three) weeks of his dismissal and his remuneration was identical to what he received whilst in the employ of the respondent. The respondent further contended that the applicant suffered no financial loss as a result of the dismissal and that he had stated through his previous attorney that a fair compensation would be nine months.

75] Relying on the case of *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), the respondent submitted in its heads of argument that our law does not allow an award of punitive damages, even in the case of a breach of a constitutionally protected right. This case is distinguishable from the present case in that it involved a claim for damages arising out of a series of assault alleged to have been perpetrated by members of the South African Police Services ("the SAPS"). The present case entails compensation as envisaged in terms of the statutory provisions of the LRA.

76] Compensation for automatically unfair dismissal is dealt with under section 194 of the LRA, and subsection 3 thereof provides as follows:

> *"(3) The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal."*

77] The principle enunciated in *Johnson & Johnson (Pty) Ltd v CWIU* (1999) 20 ILJ 89 (LAC) remains instructive despite the fact that the decision was based on the repealed s194 (2) of the LRA. It is instructive because it clarifies the difficulty and confusion that sometimes arises about the distinction between compensation in terms of the LRA and damages under the law of contract or delict. *Johnson & Johnson's case* is also important in that it clarified the relationship between dismissal and compensation to be awarded in an unfair dismissal or unfair labour practice.

78] Carl Mischke, writing in the *Contemporary Labour Law* volume

5 No. 3 October 2005, says:

> *"Compensation has its origin in the LRA, damages in common law, arises in respect of a delict (an unlawful act) or a breach of a conduct. Statutory compensation is subject to an upper limit in terms of s194 of the LRA; this limit does not apply in the case of common law damages. While common law damages usually relate to proven patrimonial loss."*

79] In *CEPPWAWU & Another v Glass & Aluminum 2000 CC* (2002) 5 BLLR 399 (LAC), a case involving dismissal of a trade union representative because of his trade union activities, the court held that if a dismissal is as a result of any of the reasons stated in s187 of the LRA, that dismissal:

> *"[48] …strikes at the essence of the values which form the foundations of our new democratic society as enunciated in the constitution. It is a dismissal that undermines the fundamental values that the labour relations community in our country depends on to regulate its very existence."*

80] It was with due regard to the above reasons that the court concluded that:

> "Accordingly such dismissal deserves to be dealt with in a manner that gives due weight to the seriousness of the unfairness to which the employee so dismissed has been subjected."

The Court went further to say:

> *"[49] In considering whether or not to award compensation in such a case, the court must consider that not to award any compensation at all where reinstatement is also not awarded may give rise to the perception that dismissal for such a reason is being condoned. This may encourage other employers to do the same. It must also take into account the fact that such a dismissal is viewed as most egregious under the Act. Accordingly there must be punitive element in the consideration of compensation."*

81] The determination of a *"just and equitable"* compensation entails a consideration of the interests of both the dismissed employee and the employer. The Constitutional Court in dealing with this issue in the case of *Hoffman v SA Airways* (2000) 21 ILJ 2357 (CC) held (at para 45) that:

> "The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations, third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. In variably, the nature of the infringed and the

nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining the appropriate relief, we must carefully analyze the nature of [the] constitutional infringement, and strike effectively at its source."

82] In evaluating the facts of this case against the above principles, it has already been indicated that the dismissal of the applicant was in contravention of the provisions of s187 (1) (g) of the LRA. The contravention is exacerbated by the treatment which was meted out to the applicant prior to his dismissal.

83] At the very first meeting where the possible retrenchment was communicated to him, the applicant was placed on suspension and told not to speak to other stakeholders in the labour market including his colleagues about his retrenchment. The applicant was essentially cut off from any moral support that he could have obtained in that difficult situation which was not of his making. He was subjected to a treatment worse than that of a person charged with theft or fraud. The respondent's approach also placed the applicant in an invidious position of having to lie to his prospective employers about the reason why he was intending to leave the employ of the respondent. He could not disclose that the reason he was leaving his employment was because he was being retrenched. I am also mindful of the fact that the applicant secured an alternative employment soon after his dismissal.

Conclusion

84] I see no reason why the costs should not follow the result.

85] In the premises, the following order is made:

1. The dismissal of the applicant on the 31st May 2004 is declared to be automatically unfair in terms of s187 (1) (g) of the LRA.

2. The respondent is ordered to pay the applicant compensation equivalent to a period of 18 (eighteen) months remuneration at the applicant's rate of remuneration at the date of his dismissal.

3. The costs should follow the result.

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MOLAHLEHI J

DATES OF HEARING : 24-29 MAY 2007

DATE OF JUDGMENT : *20 DECEMBER 2007*

APPEARANCES

FOR THE APPLICANT : DR. G J EBERSÖHN OF EBERSÖHN ATTORNEYS

FOR THE RESPONDENT: ADV G A FOURIE

INSTRUCTED BY : VAN GAALEN ATTORNEY