Not reportable/Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN

CASE: C215/2017

In the matter between:

ISAK MAY	**First Applicant**
ANNA MAY	**Second Applicant**
and	
NUWERUS VINES (PTY) LTD	**First Respondent**
SUE WRIGHT (*N.O.*)	**Second Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Third Respondent**

Date of Hearing: 12 May 2021
Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 21 June 2022

Summary: (Review – Jurisdictional issue – Resignation or dismissal – contrived resignation – arbitrator incorrectly found employees had resigned – dismissal without any justification or fair process – substantively and procedurally unfair – Offer to employees to resume work – Offer rejected – Compensation – Consideration of LAC authority in *Kemp t/a Centralmed v Rawlins* - Solatium awarded having regard to facts of the case which were significantly different from *Kemp's* case)

JUDGMENT

LAGRANGE J

[1] This is a review application of an arbitration award, in which the arbitrator held that the applicants had not been dismissed.

[2] The applicants are a married couple ('the Mays') who had worked for the first respondent for 30 years by the time their employment terminated in December 2017. They were both supervisors.

[3] The applicants claimed they had been unfairly dismissed on 29 November 2016 by the managing director of the first respondent ('Nuwerus'), Mr H Rabie ('Rabie Snr'). He had called both in and told them that they resignations were accepted to which they both responded that they had not resigned. Nuwerus claimed that they tendered their resignations on 25 November 2016.

[4] Because of the dispute about how their services had terminated, the arbitrator had first to decide whether they had actually been dismissed, before she could consider their claim of unfair dismissal.

Summary narrative

[5] It is common cause that during the week of 21 November 2017, Ms. A May ('Ms May') had requested leave for Thursday 24 November from Mr C Rabie, the owner's son ('Rabie Jnr') so she could assist her own son with the funeral of his infant son, her grandchild. There was no dispute that the leave was granted, but it seems that this was not conveyed to the farm manager, Mr R Grebe ('Grebe'). It seems that no arrangement was made for someone to substitute for Ms May in her absence, as a driver for one of the vehicles.

[6] A meeting of all supervisory and managerial staff was called the following day (25 November 2016). Rabie (Jnr) told the meeting that if someone was going to be absent they should arrange this a couple of days in advance and referred to Ms. May's absence as an example. It seems that her grandchild had died on the Tuesday and she had asked for time off the following day. It was decided at the meeting that leave arrangements for supervisory staff should be streamlined and that

the requests should no longer be made to Rabie (Jnr), but be directed to the line manager and her supervisor in future, namely Grebe and Mr F Booyse.

[7] After the meeting adjourned, the Mays went back to speak with the Rabies. According to Ms May, the Mays wanted to discuss an incident involving Mr May, which Rabie (Jnr) had mentioned to her during the meeting which had just adjourned. Rabie (Jnr) had told her he was not happy with what had happened.

[8] In his discussion with the Rabies, Mr May tried to establish what was the incident which had occurred to establish if any complaint had been laid against him by Grebe. Rabie (Jnr) confirmed that a complaint had been made about him by Grebe. According to both Mays' testimony, Mr May responded to the Rabies that if the situation between himself and Grebe continued then, after the end of the harvest in April the following year, he was going to resign and look for work elsewhere. Mr May said that Rabie (Snr) simply dismissed his suggestion of resigning out of hand.

[9] According to Ms May, Rabie (Snr) was unwilling to discuss a resignation and said they would resolve the problem by one-on-one discussions with management, and they should both return to work. Rabie (Snr) said that things were rather emotional on the Friday and that is why he wanted to first discuss the situation with other people and they would meet again on Monday. Rabie (Jnr) said the discussions took place other managers to try and see if the cause of the Mays' unhappiness could be resolved, but they could not come up with a solution and decided to accept the resignation. He claimed not to remember which of the Mays had spoken about resignation on that Friday, but he had understood that whichever one of them had raised it, they were also speaking on behalf of their spouse. This was not put to either of the Mays. Rabie (Jnr) said that Mr May had spoken about them resigning and Ms May had not dissociated herself from what her husband said. Rabie (Snr)'s testimony uncontested evidence was that in 2014 the Mays had previously said that they wanted to resign at the end of the harvest but they had not.

[10] After the meeting, Ms. May had felt faint and collapsed. Mr May had to take her home during the lunch hour. Mr May testified that, on the same afternoon, while he was having his lunch after dropping his wife at home, Grebe approached him and

they had a verbal altercation, seemingly over the fact that he was still eating. Grebe then reported this to Rabie (Snr).

[11] The Mays were called to another meeting the following Monday afternoon. According to Ms May, Rabie (Snr) appeared angry and told them that he accepted the resignation and that they should leave the farm and not return after they had signed pre-prepared written resignations he presented to them. Rabie (Snr) described his own attitude as 'business like'. Mr May told Rabie (Snr) that there was no law that he had to sign anything because he had not resigned.

[12] Ms May claimed that it was only her husband who had previously spoken of resignation and he was not speaking on her behalf when he raised the issue. She stated she was not going to resign because she would not be able to find work elsewhere owing to an injured hand. Ms May claimed that when Rabie (Snr) told them that they had to resign that day, she responded that she would go to the Department of Labour the following day to ask if it was right that she could be called in to resign. According to Ms. May, Rabie (Snr) had responded that she could write in the following day's date as the date of resignation if she wanted to go to the Department of Labour but she was going to sign the resignation letter on Monday. Rabie (Jnr) denied his father had said that, but her testimony to this effect was not disputed in cross-examination.

[13] Ms May claimed Rabie (Snr) also had said that the hand injury she was suffering from was one she had sustained at home not at work. It seems the injury in question was the one Ms May had suffered to her hand in 2014. Apparently, there was some dispute about the cause of the injury and according to Rabie (Snr)'s his own wife disputed Ms. May's version that it had occurred at work. Rabie (Snr) nevertheless agreed that Ms May had raised her problem with her hand injury. He claimed that she had recovered most of the use of her hand back and, even at the time of the injury, there was no reason that would affect her work as a supervisor because she did not need to use her hand. However, he did concede that Ms. May had said that if she resigned she would not get other work elsewhere because of it. Ms May disputed that she had regained the use of her hand, but it appeared she was still able to drive a vehicle on the farm.

[14] Ms May testified that Rabie (Snr) then told them both to sign pre-prepared resignation letters, but they both refused and he then told them both to go home and not to return to work because they would ‘sour’ things if they did. Rabie (Snr) also instructed them to hand back the farm keys and radio handsets they had. Rabie (Snr) claimed that he could not remember the Mays saying that they could not be forced to sign anything but denied saying they would sour things if they return to work or saying they should not set foot on the farm again.

[15] Before the Mays stood up to leave, Rabie (Snr) said they would be paid two weeks’ they would have worked, notice pay, harvest bonuses and leave pay, but they did not have to return to work. Mr May believed that this turn of events had arisen because of his altercation with Grebe the previous Friday. Rabie (Snr) testified that it was a big problem that two foremen were resigning just before the harvest, but he thought it was better to make a clean break and adapt to the circumstances. It was difficult for him to accept the resignations, because the Mays were good at their job. He was disappointed and felt that there was some mistake he must have made. Rabie (Snr) did concede that he had been insistent that they had resigned orally the previous Friday.

[16] The couple went to the Department of Labour which contacted the management. Ms May said they were advised that what had happened was a dismissal not a resignation and she should go to the CCMA. While they were at the Department of Labour Ms. May was phoned by Verwoerd who introduced herself as a mediator and asked if she could come and see them. Verwoerd was a consultant appointed by Nuwerus to assist them in resolving the matter.

[17] On 29 November 2017 the Mays referred an unfair dismissal case based on operational requirements to the CCMA and claimed severance pay and compensation.

[18] On 1 December 2017, Verwoerd visited the Mays at their house, with their agreement. She said to them that if they had not resigned and if Rabie (Snr) said he had not dismissed them, they should return to work. Both of the Mays confirmed she had conveyed this to them. Ms. May told Verwoerd she could not return to work

because Rabie (Snr) had told her not to set her foot on the farm again and that they would sour everything. She conceded that Verwoerd had said to her that management had asked her to approach them because management thought there was a misunderstanding, and that they could return to work. Ms. May said she would not go back to work because she did not know what Rabie (Snr) would do with her and she had never met Verwoerd before. Both Mays felt that Rabie (Snr) should at least have put something in writing instead of just sending Verwoerd, whom they had never met before, to see them at their house.

[19] On 5 December 2017, Verwoerd visited the Mays again. During that visit, Verwoerd explained that the employer wanted the conciliation and arbitration proceedings to be separated and gave them a letter. Both Mays agreed that there was a handwritten text on one side the paper in which farm's request to postpone the arbitration and their acknowledgement of receiving it was recorded. Verwoerd had photos of the Mays displaying the handwritten notice about the objection to conciliation-arbitration procedings, in order to show that they received them because they refused to sign for anything.

[20] Although Ms May was reluctant to concede being given a typed letter, she consistently said that the handwritten notification of the con-arb objection was written on the back (die agterkant) of the document they were given. Initially, she would only say that Verwoerd had asked them to sign a handwritten portion at the back of the letter confirming that they did not agree to postpone in the arbitration. She testified that Verwoerd never said they must read the letter but only read and sign the handwritten portion. She claimed she had not read the text of the letter itself, nor received it. She only read what Verwoerd said she must read. When Verwoerd left the document with her, Ms May said she just left it where it was and never turned it over.

[21] Mr May also reluctantly agreed that there was something on the other side of the handwritten document, but he never read it. He said he did not take notice of the typed portion of the document. The typed portion of the letter dated 5 December 2017 read:

"Liewe Sakkie end Gertie[1]

In sake: Dispuut rondom bedanking

Ek verwys na ons gesprek op 1 Desember 2016. Soos verduidelik aan julle het julle verbaal bedank. Nuwerus het toe besluit om julle bedanking te aanvaar. Nuwerus het julle vry gemaak van julle verpligtinge en belowe om julle nogsteeds julle kennis maand se volle salaris te betaal (Desember) asook julle bonus. Hierdie was deel van die aanbod wat gemaak is tydens julle bedanking.

Julle verweer is nou dat julle afgedank is. Dit is egter glad nie die geval nie. Ek het aan julle genoem dat indien julle dan nou nie wil bedank nie, julle terug moet gaan werk toe anders is julle afwesig van die werk. Julle het egter gesê julle wil nie teruggaan werk toe alvorens ons nie by die CCMA was nie.

Ons het die kennisgewing gekry van die CCMA en sal verder hieroor gesels by mediasie.

Van Nuwerus se kant af wil ons weer net sê dat daar iewers 'n groot misverstand is? Ons het gehoop om dit intern uit te sorteer en af te handel. Aangesien julle verkies om 'n eksterne roete te volg, sal ons dan verder gesels op 15 Desember 2016. Julle bly egter nog op Nuwerus se boeke as werknemers.

Van Nuwerus se kant af is daar geen kwaad gevoelens nie. Ons glo ons sal hierdie kan oplos by mediasie."

[22] In short, the letter confirmed management's view, as conveyed by Verwoerd to the Mays, that Nuwerus had accepted their oral resignation on 25 May, but if they maintained that they had not resigned they should return to work, otherwise they would be considered absent from work. The letter also confirmed that the Mays had

[1] The nicknames by which the Mays were known.

said they did not want to return before the parties had been to the CCMA. The letter concluded by asking whether there had not just been a big misunderstanding somewhere and the farm had hoped that the matter could be sorted out internally, but the Mays had decided to follow an external route. In the meantime, they remained on the farm's books as employees and the farm hoped that the matter could be resolved at the mediation.

[23] Very unfortunately this did not happen and the dismissal dispute proceeded to arbitration.

The award

[24] The arbitrator's first task was to determine if the dismissal had taken place.

[25] She concluded that the applicants failed to prove that they had been dismissed. Her reasons may be stated summarily as follows:

25.1 The arbitrator was persuaded that at the meeting with the Rabies the issue of their resignation was discussed and that arose both from the tensions developing between Mr May and Grebe and that they were unhappy about the discussion at the meeting with the supervisors about the new leave arrangements. Ms May believed that her absence on leave had been used as an example of the problem the new arrangement was to address and she felt personally offended by that.

25.2 It was common cause that Rabie (Snr) had said that the discussion of their resignation would be revisited on Monday the 28th November because it was an emotional matter due to the underlying issues.

25.3 Ms May did not distance herself from her husband's representations.

25.4 Evidence of Rabie (Jnr) that Ms May had agreed that he and his wife would both finish off work that Monday was not challenged, but in fact

Ms May conceded this. This was inconsistent with their claim that they were chased away and that Rabie (Snr) was aggressive with them at the meeting, rather than simply being business like.

25.5 The fact that it was common cause that Rabie (Snr) had said they would be paid their notice pay salary and leave pay together with the bonus, supports the conclusion that there was a joint acceptance of a mutual termination at that point.

25.6 Even if it is true that Ms May said that she would not resign as she would not been able to find alternative work owing to her hand injury, they nonetheless accepted that they would finish off work that day.

25.7 The fact that Rabie (Snr) did not want them to work the notice was something that arose after their resignation had been accepted.

25.8 Ms May did not distance herself from her husband's tender of resignation on 25 of November 2017 and once they had resigned it did not matter whether it was accepted or not by the employer.

25.9 Further support for the fact that they resigned is that Mr May called on his daughter to resign on the same day. It was implausible that this was done because Rabie (Snr) allegedly told them to leave the farm, because there was no evidence of any discussion about their daughter's position.

25.10 In any event, within a few days after this discussion they were told that they could return to work and their argument that they did not do so because they did not have a document and did not know Verwoerd was implausible. If the Mays had a good relationship with Rabie (Snr), there was no reason why they could not have asked Verwoerd for a letter from him confirming the offer. Accordingly, even if there had been some misunderstanding on their part about the discussions concerning their resignation, they did not show any willingness to return to work when this

was offered, which would have remedied any complaint that they had been dismissed.

25.11 The arbitrator felt that they had resisted the offer of returning to work because they believed they would be entitled to severance pay if they succeeded with an unfair dismissal claim based on retrenchment. This was evidenced by the undisputed testimony of Verwoerd that she had explained to them that severance pay would only be due if they had been retrenched.

25.12 Even though the Basic Conditions of Employment Act stated that resignation should be given in writing unless an employee is natural, that did not mean that an employee could not demonstrate an intention to stop working.

25.13 Further, they accepted the payments including the bonus payment made pursuant to the terms of the resignations as set out in the resignation letters which they refused to sign.

25.14 Lastly, when weighing up the two versions and in the light of the onus, and noting the contradictions between the evidence of the applicants, the arbitrator found the respondent's version more plausible.

Grounds of Review

[26] The founding affidavit in the review application attacked both the findings of the arbitrator and alleged she did not assist the Mays in the arbitration proceedings. No supplementary affidavit was filed, but a lengthy answering affidavit was filed. The founding papers were filed without legal assistance, but by the time the matter was argued, the Mays were represented by Attorneys and counsel and the grounds of review were distilled in a more succinct fashion. I do not intend to set out all the grounds of review, but to highlight the main ones raised:

26.1 The applicants discharged the onus of establishing they were dismissed.

26.2 There was no reason for the respondent to call the meeting on Monday to firm up a resignation when the only indication it had was that Mr May was thinking of resigning at the end of the harvest season.

26.3 The letter produced by the consultant, did not contain an unequivocal invitation for them to return to work but implied that matters could be resolved at the conciliation. Moreover, the evidence showed it was not given to them.

26.4 While it was conceded that Verwoerd was instructed to tell the Mays to return to work, this should be seen as an attempt to mitigate the employer's mistake in unfairly dismissing them, and their rejection of the proposal was not unreasonable in view of the way their services had been terminated and Rabie (Snr) subsequent failure to say anything about returning to work to Ms May when they had met once after 28 November 2017.

26.5 If the employer was reluctant to see the applicants go, it made no effort to persuade them to stay before accepting the resignation.

26.6 In the circumstances, the Mays' refusal to accept the proposed return to work was not unreasonable and they were entitled to the maximum compensation.

Evaluation

[27] It is a jurisdictional requirement in determining an unfair dismissal dispute to establish that a dismissal has taken place[2]. Because jurisdictional issues must be objectively determined, a review of an arbitrator's finding on whether or not a dismissal to place cannot be based on reasonableness. The arbitrator was either right or wrong. Accordingly, as in this instance, on review the court is essentially determining whether the arbitrator's finding was objectively validated by the evidence

[2] *Solidarity on behalf of Van Tonder v Armaments Corporation of SA (SOC) Ltd & others* (2019) 40 *ILJ* 1539 (LAC) at para [39].

before them. In this case, the crux of the matter is whether or not the Mays resigned or whether they were dismissed.

[28] In my view, the evidence did not support the arbitrator's finding that they had resigned. In essence, Nuwerus, claimed to have simply tried to confirm in writing the alleged oral resignations tendered by the Mays on Friday, 25 December 2017. The first question is whether their conduct on that occasion could be construed as unequivocal evidence of their resignation.

[29] Mr. May had not said he wanted to resign on notice or with immediate effect, but said that if the problems that had arisen could not be resolved he would like to resign at the end of the harvest. That was a clear reference to the difficulties he and Grebe were having in their working relationship. When he put this into Rabie (Snr), Rabie (Snr) did not dispute that he had said he was thinking of resigning at the end of the harvest if the problems could not be resolved. He also said that his response was that Mr. May should wait so that he could have confidential discussions with the other persons and then on Monday they would take a decision ('dan sal ons Maandag 'n besluit neem'). From this response it is also clear that Rabie (Snr) did not regard anything as finalised, and the only thing that warranted discussion flowing from the meeting was the possibility that Mr. May might resign after the harvest. This version is consistent with the evidence of the Rabies that between Friday and Monday they had discussions with various staff to see whether the problems could be resolved and concluded they could not be.

[30] As regards Ms. May she might have accompanied her husband but she did not utter a word to indicate that she was also intending to resign. Even if it could be assumed in Nuwerus's favour that she made common cause with her husband's frustration and intentions by her silence on Friday, nothing than an intention to resign in the future if the work situation did not improve for Mr. May was expressed. This is a far cry from conduct evincing "'a clear and unambiguous intention not to go on with the contract of employment, by words or conduct that would lead a reasonable persion to believe that the employee harboured such an intention".[3]

[3] See *Sihlali v SABC* [2010] 5 BLLR 542 (LC) at para 11.

[31] Accordingly, the purported written ‘confirmation’ of their resignations, which were prepared for them for signature, did not even conform with the intention expressed by Mr. May the previous Friday. What Nuwerus sought to have confirmed in writing, was a completely new characterisation of what had transpired, namely an unqualified resignation on ordinary notice by both of the Mays.

[32] When the Mays refused to sign the letters, they made it quite plain that they did not agree that they had tendered their resignations. Rabie (Snr) could not dispute Mr May’s evidence that he had said there was no law which compelled them to sign that he had resigned. He also agreed that Ms May had said she wanted to go to the Department of Labour and did not dispute her statement that he had said she could put the following day’s date in the resignation form, but she had to sign it on Monday. It was also common cause that Ms. May had raised the question of her inability to get other work because of her injured hand. There is no reason why that issue would have even come up in discussion if it had not been for the fact that she was explaining why she would not have expressed an intention to resign. At the Monday meeting, management gave absolutely no indication that Nuwerus would have preferred to retain them even if it was only until the end of that harvest season. What emerges from the evidence is that Rabie (Snr) was insistent that they ‘confirm’ their resignations and wanted to end their employment relationship without further delay. They were even told not to finish working that day but to go home immediately. What transpired at the meeting was irreconcilable with a situation in which an employer was reluctantly asking long serving and reliable employees to confirm their unexpected immediate resignation.

[33] The arbitrator’s finding that the Mays agreed that they would finish of that Monday was based solely on Rabie (Jnr)’s evidence elicited by a leading question and had never been put to either of the Mays under cross-examination. It was clear from their testimony that the clearly understood they were being told to leave the farm then and there by Rabie (Snr.). The arbitrator’s reliance on Mr May phoning his daughter to leave with them once they were told to leave the premises, is hardly confirmation that they had intended to resign. It was far more likely to have been a reaction to the fraught situation created by their expulsion from the premises. In any event, it was an issue which should have been raised with the Mays during their

testimony before the arbitrator should have placed reliance on it. Further, the arbitrator's reliance on Nuwerus deciding to pay them out their notice pay, flowed from its intention to have a clean break, not from any prior discussion and agreement with the Mays.

[34] In conclusion, the probabilities favour an interpretation that Nuwerus attempted to portray the termination of the Mays' employment as a resignation on their part, by reinterpreting what had transpired on the previous Friday, which was nothing more than a qualified announcement of an intention to resign by Mr May, as something immediate and final which embraced both the Mays. Consequently, the arbitrator's finding that they had resigned must be reviewed and set aside and substituted with a finding that they were dismissed.

The fairness of the dismissal

[35] Because of the employer's version that the Mays services terminated on account of resignation, it advanced no defence for the fairness of the dismissals either in terms of justifying them on grounds of misconduct, incapacity or operational reasons. Accordingly it follows that it is failed to show that there was a fair reason for their termination, or any fair procedure that was followed. The dismissal was a dismissal on notice, with no procedure being adopted beforehand. It was also summary in nature, with the Mays being asked to leave the farm premises immediately so they did not contaminate co-employees. Ms May testified that it was Rabie (Snr) was honest enough to say that personally he felt he had had made a mistake or failed in some way as an employer in relation to the way their services ended.

Relief

[36] The Mays had asked for compensation. In the circumstances, given their very long service and the absence of even a tentative justification for their dismissals, the

question which must arise is whether there is any good reason not to award them the maximum permissible compensation of 12 months remuneration.

[37] The only countervailing consideration is Nuwerus's efforts to make amends after the dispute was referred to the CCMA. Nuwerus enlisted Verwoerd's help very quickly to try and resolve the Mays dispute. The details of her visits to the Mays have been outlined above.

[38] After the conflictual and abrupt way they had to leave the farm, The Mays' wariness about readily accepting representations, from someone they had never met or heard of before, to the effect that Nuwerus was suddenly willing to resume the working relationship, was to some extent also understandable. They had enjoyed a close working relationship with senior management in the farm environment for an extended period, then been unceremoniously drummed out of a lifetime's service on the basis of a contrived resignation. Now were being asked to accept Verwoerd's request for them to return to work as sincere. Ms May's testimony that she and Rabie (Snr) had met at least once after the events of 28 November and he had said nothing to her to suggest Nuwerus had changed its stance was not challenged. Ms May said she expected that at least Rabie (Snr) would have written to them to say there was a misunderstanding and they should return to work.

[39] On the second occasion Verwoerd visited the Mays she did bring a typed but unsigned letter. There was some equivocation about whether it was handed to them. The Mays vacillated about whether they received it. Much of the evidence traversed the handwritten notice which Verwoerd had written 'on the other side' of the paper confirming that she had notified the Mays that the employer would object to the arbitration being held immediately if the dispute was not settled at conciliation. The letter was consistent with the undisputed message conveyed by Verwoerd during her first visit about there perhaps being a big misunderstanding and that if they did not consider themselves to have resigned they should return to work. While maintaining Nuwerus's stance that they had resigned, the letter did confirm that if they did not want to resign they should return to work, or be considered absent from work, but noted that they had said they did not want to return to work before the matter had been before the CCMA. On a balance of probabilities, it seems more likely than not

that the letter was given to them, but they were either of a fixed mind by then that they had been unfairly dismissed and it was better to await the CCMA process and an award of compensation or, because of the way they had been dismissed, they remained sceptical of what might happen if they returned to the farm. Nonetheless, if they were advised not to return to work, or misunderstood that they could not simply ignore Nuwerus's offer that they resume work even if they had a valid claim for unfair dismissal, that was bad advice or a serious misunderstanding on their part. I note there is no evidence they received any independent legal advice since their visit to the Department of Labour the day after their dismissal.

[40] In *Kemp t/a Centralmed v Rawlins* (2009) 30 *ILJ* 2677 (LAC), the Labour Court found that a doctor, who had been employed and who had been dismissed a day before the went on maternity leave, had not been automatically unfairly dismissed but had been unfairly retrenched. The employer had offered to reinstate the doctor shortly before she referred her dismissal dispute to the CCMA, and on a later occasion. The Labour Court awarded her twelve months' remuneration as compensation. She was employed elsewhere five months' after her dismissal on a higher salary. On appeal, the Labour Appeal Court, the LAC decided that compensation should not have been awarded to the doctor.

[41] In the course of its reasoning the LAC had the following to say about some of the factors that may influence a court's decision whether or not it should order payment of compensation, *viz*:

> "[20] There are many factors that are relevant to the question whether the court should or should not order the employer to pay compensation. It would be both impractical as well as undesirable to attempt an exhaustive list of such factors. However, some of the relevant factors may be given. They are:
>
> > (a) The nature of the reason for dismissal; where the reason for the dismissal is one that renders the dismissal automatically unfair such as race, colour, union membership, that reason would count more in favour of compensation being awarded than would be the case with a reason for dismissal that does not render the dismissal

automatically unfair; accordingly, it would be more difficult to interfere with the decision to award compensation in such case than otherwise would be the case.

(b) Whether the unfairness of the dismissal is on substantive or procedural grounds or both substantive and procedural grounds; obviously it counts more in favour of awarding compensation as against not awarding compensation at all that the dismissal is both substantively and procedurally unfair than is the case if it is only substantively unfair, or, even less, if it is only procedurally unfair.

(c) Insofar as the dismissal is procedurally unfair, the nature and extent of the deviation from the procedural requirements; the less the employer's deviation from what was procedurally required, the greater the chances are that the court or arbitrator may justifiably refuse to award compensation; obviously, the more serious the employer's deviation from what was procedurally required, the stronger the case is for the awarding of compensation.

(d) Insofar as the reason for dismissal is misconduct, whether or not the employee was guilty or innocent of the misconduct; if he was guilty, whether such misconduct was in the circumstances of the case not sufficient to constitute a fair reason for the dismissal.

(e) The consequences to the parties if compensation is awarded and the consequences to the parties if compensation is not awarded.

(f) The need for the courts, generally speaking, to provide a remedy where a wrong has been committed against a party to litigation but also the need to acknowledge that there are cases where no remedy should be provided despite a wrong having been committed even though these should not be frequent.

(g) Insofar as the employee may have done something wrong which gave rise to his dismissal but which has been found not to have been sufficient to warrant dismissal, the impact of such conduct of the employee upon the employer or its operations or business.

(h) Any conduct by either party that promotes or undermines any of the objects of the Act, for example, effective resolution of disputes."

[42] Factors the LAC considered were that: there was a genuine and reasonable offer of reinstatement made which the doctor did not accept, had she accepted it she would not have suffered financial loss and neither party would have incurred legal costs. In addition, for some time after the offer was made she did not even respond. The LAC concluded:

> Such conduct undermines one of the primary objects of the Act which is the effective (which includes expeditious) resolution of disputes: it is better that disputes be resolved through conciliation than through litigation or arbitration or industrial action.
>
> The conclusion that the employee should not have been awarded compensation in this case seems to be quite in line with the decision of this court to the same effect in *Johnson & Johnson*[4], particularly if regard is had to paras 41-43 and paras 49-51 of this court's judgment." [5]

[43] It must also be mentioned that the LAC considered the Labour Court's finding that the manner and timing of the dismissal "were deserving of censure", but found in that instance, that the court had not substantiated this conclusion. However, the LAC did not view this this an irrelevant factor.

[44] On the facts of this case, the way in which the Mays were peremptorily dismissed on an obviously contrived basis, given their very many years of unquestionably loyal and good service, is deserving of censure in my view. It should

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

[5] At para [30].

be mentioned that in *Kemp's* case, the doctor had been employed for one year when she was dismissed. Ms May testified that they day she was so unpleasantly sent off the farm was the worst day in her life. That must be balanced against the fact that Nuwerus, did make a serious effort to reverse its clumsy strategem and there is no reason to assume its call on the Mays to resume work, albeit on the face-saving basis that there had been a misunderstanding, was not genuine. Even so, the peremptory way their lifetime of service had been ended could not simply be wished away and in that context it is understandable, given also that they were lay persons without legal representatives to assist them, if they remained distrustful of the employer. It is possible that if senior management had communicated it, rather than an interlocutor unknown to the Mays, there would have been a better chance they would have acceded to it. Whether the frayed relationship with the Mays would have been soundly restored, is somewhat doubtful. Nonetheless, the offer was made twice and was made promptly. Nuwerus's conduct in this respect was in keeping with the objectives of the LRA in promoting dispute settlement as a first choice of dispute resolution rather than through adversarial means. In the circumstances, the award of compensation made must balance these considerations and accordingly, I believe that a *solatium* of two months' remuneration adequately balances these conflicting imperatives.

Order

[1] The finding of the Second Respondent in her award dated 31 March 2017 in case number WECT 20314-16 that the Applicants were not dismissed by the First Respondent is reviewed and set aside.

[2] For the reasons given in this judgement, the findings of the said award are substituted with the following findings and relief:

2.1 Both Applicants were substantively and procedurally unfairly dismissed by the First Respondent.

2.2 The First Respondent's offer to resolve the dismissal dispute by allowing the Applicants to return to work was a

serious attempt to resolve the dispute which would have afforded them significant redress for their unfair dismissal, albeit without an admission of wrongdoing by the First Respondent.

2.3 The First Respondent must pay the First and Second Applicants an amount of compensation of two months' remuneration each, amounting to R 11,442-00 and R 12,960-00 respectively.

[3] The payment of compensation in paragraph 2.3 must be made within fifteen (15) days of the date of this judgment.

[4] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

Appearances/Representatives

For the Applicant Attorneys	C Bosch instructed by Ismail Mohamed
For the First Respondent Le Roux Inc.	F Rautenbach instructed by Murray Fourie &