

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN DURBAN

Case no: DA3/01

In the appeal between

H.M. LIEBOWITZ (PTY) LTD t/a

**THE AUTO INDUSTRIAL CENTRE
GROUP OF COMPANIES**

Appellant

and

LOUIS ALBERTO FERNANDES

Respondent

JUDGEMENT

ZONDO JP

Introduction

[1] I have had the opportunity of reading the judgement prepared by Page AJA which appears after this judgement. I agree with him that the appeal falls to be dismissed with costs. The reasoning which Page AJA has relied upon to reach that conclusion is based almost entirely on considerations relating to situations to which s194(1) of the Labour Relations Act, 1995 (Act 66 of 1995) (“**the Act**”) applies and on court decisions that deal with such situations

whereas that subsection does not apply to the case before us. Subsection (2) of sec 194 does. That judgement attaches insufficient weight to the provisions of sec 194(2) of the Act and the fundamental differences between the provisions of s194(1) and those of s194(2). Regrettably I am unable to agree with that approach . In my view the correct approach must take sufficient account of the specific provisions of s194(2). It must also demonstrate a sufficient appreciation of the limited nature, if any, of the weight that may be attached to Court decisions that relate to sec 194(1) when the case before us is one in which sec194(2) applies. I therefore set out below my reasons for the conclusion that the appeal should be dismissed with costs.

Background

[2] After the appellant had dismissed the respondent from its employ, a dispute arose between the two on whether that dismissal was fair and what relief, if any, the respondent was entitled to if it was unfair. In adjudicating the dispute the Labour Court concluded that the dismissal was both substantively and procedurally unfair. Substantive unfairness was based on the appellant having failed to prove that there was a fair reason related to the respondent's conduct, capacity or based on the appellant's operational requirements justifying the respondent's dismissal. It ordered the appellant to pay the respondent compensation in an amount equal to twelve months' remuneration, severance pay and costs. As the respondent's monthly remuneration was R15000,00 per month the compensation totalled R180 000,00. At the time of the trial in the Labour Court, a period of more than 12 months had expired since the dismissal . The appellant has appealed to this Court against only the order awarding the respondent compensation and costs. It has not challenged the finding that the dismissal was both substantively and procedurally unfair.

The appeal

[3] The appellant contends that the Court a quo should not have awarded any compensation to the respondent. In other words, it should have refused to

exercise its discretion in favour of awarding him compensation. For this contention the appellant relies on certain circumstances of this case. Page AJA has set these out in par 4 of his judgement. For convenience I also set them out. They are that:

- a) The respondent was employed by the appellant from April 1997 to the end of May 1998 when the notice of termination given to him on 17 April 1998 expired.
- b) He obtained alternative employment on 1st August 1998, and was thus only unemployed for two months.
- c) The respondent challenged his dismissal and the various attempts to resolve the dispute occupied more than 12 months before the matter came to trial before the Labour Court.
- d) As there was no suitable post available for respondent, the appellant was unable to resort to the expedient of reinstating him in order to avoid the payment of R180 000,00 which would otherwise follow in terms of s194(2) if his dismissal was found to be unfair in terms of that section.
- e) In the premises the appellant made the tender of R75 000,00 already mentioned, which it calculated to be a more than adequate compensation, not only for the patrimonial loss suffered by the respondent, but also as solatium for whatever injury respondent may have suffered if his dismissal proved to be unfair.
- f) The respondent refused this tender. Appellant contends that in so doing, he acted unreasonably to such a degree as to justify the Court in refusing to award him compensation in terms of the section.

[4] Section 193 of the Act makes provision for remedies that the Labour Court (or an arbitrator in the case of arbitration proceedings) may grant if it finds that a dismissal is unfair. It provides that “ **the Labour Court or the arbitrator may:**

- g) order the employer to reinstate the employee from any date not earlier than the date of dismissal;**
- h) order the employer to re - employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or**
- i) order the employer to pay compensation to the employee”.**

[5] Sec 193(3) gives the Labour Court power, in addition to any order that it may make in terms of ss(1), to make any other order that it considers appropriate in the circumstances when the case before it is one where it has found the dismissal to be automatically unfair or if the case before it relates to a dismissal based on operational requirements.

[6] Sec 194(1) - (3) reads thus:-

“(1) If a dismissal is unfair only because the employer did not follow a fair procedure, compensation must be equal to the remuneration that the employee would have been paid between the date of dismissal and the last day of the

hearing of the arbitration or adjudication, as the case may be, calculated at the employee's rate of remuneration on the date of dismissal. Compensation may, however, not be awarded in respect of any unreasonable period of delay that was caused by the employee in initiating a claim.

- 2) The compensation awarded to an employee whose dismissal is found to be unfair because the employer did not prove that the reason for dismissal was a fair reason related to the employee's conduct, capacity or based on the employer's operational requirements, must be just and equitable in all the circumstances, but not less than the amount specified in subsection (1), and not more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.
- 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."

[7] Section 194 deals with limits on compensation. Ss(1) deals with a case where the dismissal is unfair only because the employer did not follow a fair procedure. Ss(2) deals with a case where the dismissal has been found to be

unfair “because the employer did not prove that the reason for dismissal was a fair reason related to the employee’s conduct, capacity or based on the employer’s operational requirements”. Ss(3) deals with a case where the dismissal is automatically unfair.

[8] This matter raises the question of whether the Labour Court, or, an arbitrator in the case of arbitration proceedings, has a discretion to refuse to award compensation to an employee whose dismissal it has found to be unfair by reason of the fact that the employer has failed to prove that there was a fair reason for the dismissal and in respect of which it has found that the employer did not follow a fair procedure. If the Court has such a discretion, the next question that this case raises is that of what factors are relevant to the exercise of that discretion. This Court has not previously had occasion to pronounce on this issue. The decision of this Court in **Johnson and Johnson(Pty) Ltd v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC)** did not deal with such a case. It dealt with a case where the only reason why the dismissal had been found unfair was that the employer had not followed any fair procedure in dismissing the employees. The same applies to the two other decisions of this Court referred to in Page AJA’s judgement, namely, **Lorentzen v Sanachem (Pty) Ltd (2000) 21 ILJ 1075 (LAC)** and **Alpha Plant & Services (Pty) Ltd v Simmonds & Others (2001) 22 ILJ 357 (LAC)**. The decisions of the Labour Court that are referred to in Page AJA’s judgement, namely **Whall v Brandadd Marketing (Pty) Ltd (1999) 20 ILJ 1314 (LC)**, **Auy der Hein v University of Cape Town (2000) 21 ILJ 178 (LC)** and **Scribante v Avgold Ltd (2000) 21 ILJ 1864 (LC)**, also dealt with the same type of case.

[9] The question that arises in this matter is: under which subsection of s194 does a case fall where the dismissal is unfair both because the employer has failed to prove a fair reason to dismiss related to the employee's conduct or capacity or based on the employer's operational requirements and where no fair procedure was followed? Obviously such a case does not fall under ss(1) because, for a case to fall under ss(1) the position must be that there is only one reason why the dismissal is unfair and it must be that the employer did not follow a fair procedure. Where there are two or more reasons rendering the dismissal unfair, ss(1) is not applicable. That is because of the use of the word "only" in the subsection.

[10] Does such a case fall under ss (2) or ss(3) or both? I think that only a case where the dismissal is an automatically unfair dismissal falls under ss (3) despite the fact that the reason for such dismissal also constitutes no fair reason to dismiss. This is because a special category has been provided for such cases, namely, ss (3). Neither ss(1) nor ss(2) applies to such a case. In my view a case such as this one, where the dismissal is unfair both because the employer has failed to prove the existence of a fair reason to dismiss and because the employer has failed to follow a fair procedure falls under the provisions of ss(2). The language used in ss(1) excludes a case where there are two or more reasons rendering the dismissal unfair. It also excludes those cases where, although there is one reason why the dismissal is unfair, such reason is not the employer's failure to follow a fair procedure. There is no exclusion in ss(2) of a case where the absence of a fair reason to dismiss is not the only reason rendering the dismissal unfair. This is, in my judgement, the significance of the absence of the word "only" in ss(2) which is present in ss(1).

[11] This matter was argued on the basis that the Court a quo had a discretion to refuse to award compensation. I am prepared to deal with the matter on that basis, too. In passing I mention that it seems to me that it will be very difficult to find a case where, after finding a dismissal to have been unfair both because there was no fair reason to dismiss the employee and because the employer failed to follow a fair procedure, the Court or an arbitrator would nevertheless consider it appropriate to exercise its discretion against awarding the employee compensation or reinstatement.

[12] Subsections (1) and (2) of sec194 deal with different situations and there are fundamental differences between the two subsections. The differences between the two subsections are the following:-

- (a) ss(1) deals with a case where the employer had a fair reason

to dismiss but has failed to follow a fair procedure whereas ss(2) deals with a case where the employer has no fair reason to dismiss; this means that in the case of ss (1), if the reason for the dismissal is misconduct, the employee has been proved to be guilty of misconduct of sufficient seriousness to justify his dismissal but the employer failed to follow a fair procedure, whereas, in the case of ss(2), where, for example, the reason for dismissal was based on the employee's alleged misconduct, it means that the employee is innocent of any misconduct of so serious a nature as to justify his dismissal;

- b) whereas ss(1) is limited to a case where the unfairness of the dismissal is due to the employer's failure to follow a fair procedure, ss(2) is not limited to cases where the unfairness relates only to the absence of a fair reason to dismiss;
- c) whereas ss(1) is limited to cases where the unfairness is based on a single reason and it is the one specified therein, there is no such limitation in ss(2);
- d) whereas ss(1) specifies one formula that ensures that, if the Court or the arbitrator exercises its discretion in favour of awarding compensation, the amount to be awarded is certain, this is not the case with ss(2).
- e) in a ss(1) situation the remedy of reinstatement is not competent (see **Mzeku & Others v Volkswagen SA (Pty)**)

Ltd & Other 2001 (4) SA 1009 (LAC par 79 at 1037F)

whereas in a ss(2) situation reinstalment is not only competent but it is the primary remedy (see s 193(2)) and Mzeku's case, supra, at paras 72 - 78;)

- f) whereas ss(1) does not contain any express requirement that compensation awarded to an employee under it must be **“just and equitable in all the circumstances”**, ss(2) contains such a requirement;
- g) whereas in ss(1) an express provision is made to the effect that compensation may not be awarded in respect of any unreasonable period of delay that is caused by the employee in initiating or prosecuting a claim, there is no express provision to such effect in ss(2); of course, this does not mean that under ss(2) an employee may be awarded compensation for an unreasonable period of delay caused by him because, subject to the minimum prescribed in the subsection, the employee could be deprived of compensation for such period on the basis that to award him compensation for such period would offend the requirement of the subsection that compensation must be **“just and equitable in all the circumstances”**.

[13] In considering whether the factors relied upon by the appellant for its contention that the Court a quo should have refused to award compensation are relevant and what weight, if any, should be given to them, the Court must, in my judgement, consider the above fundamental differences between the two

subsections and, make its decision on a full appreciation of their role in ss(2). What may have been said in decisions dealing with ss(1) is of very limited assistance, if any, in making such a decision, although, quite obviously, one cannot deal with any one of the three subsections without bearing the others in mind.

[14] One of the grounds on which the appellant relies to contend that the Court a quo should have exercised its discretion against awarding any compensation to the respondent is the duration of the respondent's employment with the appellant at the time of his dismissal. The respondent had been employed for about a year when he was dismissed. I think the appellant's point is that, if it appears that the compensation that must be awarded, if any is to be awarded, is a large amount, the Court must bear in mind that the respondent had been in the appellant's employ for a limited period and, should rather not be awarded any compensation at all. Is the length of service relevant to such a question?

[15] Although length of service may be relevant to a case where the only reason why the dismissal is unfair is that the employer failed to follow a fair procedure, I can see no reason why it would be relevant in a case where there existed no fair reason for the employer to dismiss the employee in the first place. The illogicality of the proposition in a case to which ss(2) applies is obvious. To regard length of service as relevant would amount to letting the employer benefit from his own unacceptable conduct because the employer would dismiss the employee for no fair reason before he can acquire a long service that may be taken into account to the employer's prejudice if the employee is dismissed later rather than sooner. In a case where the dismissal is unfair only because the employer did not follow a fair procedure, one is dealing with an employee who did not deserve to continue in the employ of the employer in any event because there was a fair reason to dismiss such a employee and the employer only got the procedure wrong whereas in a ss(2) case one is dealing with an employee who should not have been dismissed in the first place and who should have been allowed to continue in the employer's employ. I therefore conclude that in this case the respondent's length of service was irrelevant and the Court a quo was correct in not taking it into account.

[16] Another ground on which the appellant relied for its contention that the Court a quo should have refused to award compensation is that the respondent obtained alternative employment within two months of dismissal which means that he was unemployed only for two months. It is this contention that raises the question of the relevance of patrimonial loss to the question whether the Court a quo should have refused to award compensation.

[17] Page AJA expresses the view that the reasoning which has led the Labour Court and this Court to the conclusions that they have reached in the decisions he refers to **“is helpful in determining the circumstances under which the Court should exercise its discretion in favour of, or against, awarding compensation”**. I am unable to agree with this view - at least not without qualification. As I have already said, those decisions relate to ss(1) situations and not ss(2) situations and, for that reason, the reasoning in those decisions is, in my view, of very limited assistance, if any.

[18] The view is also expressed that **“ the ruling by this Court that patrimonial loss is irrelevant to the exercise of this Court’s discretion has enjoyed almost general acceptance and has never been reversed”**. It is also suggested that that ruling **“ remains binding on this Court unless it is shown to be clearly wrong which has not even been contended by the appellant”**. I am also unable to share the view that the ruling of this Court in **Johnson and Johnson** that patrimonial loss is irrelevant to the exercise of the discretion to award or not to award compensation is binding on this Court in this matter before us. In **Johnson and Johnson** this Court was dealing with a ss(1) situation whereas in the case before us ss(1) has no application. I have been unable to find any decisions where this Court has made a ruling on the relevance or otherwise of patrimonial loss in a ss(2) situation. Obviously, in dealing with a ss(2) situation, one cannot disregard the provisions of ss(1) altogether but that is very different from saying that a ruling made in relation to ss(1) is binding on us when we deal with a ss(2) situation.

[19] It has also been said that, although the ruling that patrimonial loss is

irrelevant to the exercise of the discretion whether or not to award compensation was enunciated with reference to procedural unfairness as contemplated by s194(1), **“it must apply a fortiori to substantive unfairness contemplated in s 194(2) which incorporates the minimum criterion laid down by ss(1)”**. As already indicated, I am unable to share this view. In my view the question whether or not patrimonial loss is relevant to the exercise of the discretion to award or not to award compensation in a ss(2) situation cannot be decided on the basis of the provisions of ss(1) and the decisions of courts relating to that subsection with little or no regard being had to the provisions of ss(2). Indeed, the provisions of ss(2) are pivotal to such a decision, particularly in the light of the fundamental differences that exist between the two subsections as already shown above.

[20] I have previously had occasion, sitting in the Labour Court, to deal with the provisions of s194(1),(2) and (3) extensively. This was in **Adams & Others v Coin Security Group (Pty) Ltd (1999) 20 ILJ 1192 (LC)** at paras 91 (p 1218) to 100 (p 1220), in particular at paras 94 to 100. The main concern about s194(1) is that the only discretion that the Court has is whether to award or not to award compensation and that, if it exercises its discretion in favour of awarding compensation, it has no power to determine the amount but must award the amount of compensation that the statutory formula dictates should be awarded to the employee even if such amount is much higher than the employee’s actual loss or is much higher than the amount that the Court would have considered just and equitable to award in the particular circumstances.

[21] In dealing with the question of the discretion whether to award or not to award compensation in a ss(2) situation, three scenarios are contemplated in

ss(2). The first scenario is where the period that has lapsed from the date of dismissal to the last day of the hearing is less than 12 months e.g. if it is one month. In such a case the minimum compensation that is awardable to the employee is one month's remuneration and the maximum awardable is 12 months remuneration. If, in such a case, the employee seeks the minimum compensation or if the Court is seeking to award the minimum compensation, the requirement in ss(2) that compensation that is awarded must be “**just and equitable in all the circumstances**” is of no relevance because a lesser amount than that cannot be awarded.

[22] The second scenario is where the period from the date of dismissal to the last day of the hearing is less than 12 months and the compensation claimed or sought to be awarded is above the minimum but less than the maximum. In such a case it seems to me that patrimonial loss is relevant because, if no patrimonial loss was suffered, an award of compensation exceeding the minimum may offend the requirement of the subsection that compensation awarded must be “**just and equitable in all the circumstances**”. This does not necessarily mean that the absence of patrimonial loss would operate as a bar to the Court awarding compensation exceeding the minimum. Indeed, there may well be circumstances which satisfy the Court that, despite the absence of patrimonial loss, it would be “**just and equitable in all the circumstances**” for the Court to award the employee compensation that goes beyond the minimum - even upto the maximum.

[23] The third scenario is where the period that has lapsed from the date of dismissal to the last day of hearing is 12 months or more. In such a case the only compensation that can be awarded, if compensation is awarded, constitutes both the minimum and the maximum. In that case, which is the same as the case

before us, the application of ss(2) will produce the same result, namely, the same amount of compensation. Whether one regards that amount of compensation as the minimum or as the maximum makes no difference. In that case patrimonial loss is irrelevant. In the light of all this I conclude that, on the facts of this case, the fact that the respondent only suffered loss of income of two months is irrelevant. The appellant's contention that the Court a quo should have taken this into account falls to be rejected.

[24] The appellant also contended that the Court a quo should have taken into account the fact that attempts to resolve the dispute had taken more than 12 months. This contention was not directed at blaming the delay on the respondent. That being the case, I can see no reason why it can be said that the delay should operate so as to prejudice the respondent only. The appellant also contended that the Court a quo should have taken into account that there was no suitable post available for the respondent and, as a result, the appellant could not offer the respondent reinstatement if it sought to avoid the payment of the amount of R180 000,00. This contention is inconsistent with the finding of the Court a quo that the appellant had no fair reason to dismiss the respondent. If the Court a quo had been satisfied that the appellant had no suitable post in which it could have continued to employ the respondent, it would not have held that the appellant had failed to show the existence of a fair reason to dismiss the respondent. As the correctness of this finding of the Court a quo was not challenged on appeal, the appeal must be decided on the basis that the appellant had no fair reason to dismiss the respondent and that the respondent could have continued in the appellant's employ.

[25] The appellant also referred to the fact that it made the tender of R75 000,00 to the respondent at the commencement of the trial in the Court a quo. In this regard the appellant made two submissions. The one was that such amount was more than adequate compensation not only for the patrimonial loss suffered by the respondent but also as a solatium for whatever injury the respondent may have suffered. The second was that in refusing such **“tender”**, the respondent acted so unreasonably that the Court should have refused to award him any compensation. As I have found that, on the facts of this matter, patrimonial loss was irrelevant, the fact that the amount of the **“tender”** was more than the patrimonial loss suffered by the respondent is also irrelevant and could not have

been relied upon by the Court a quo to refuse to award the respondent compensation.

[26] I also do not agree that the respondent acted unreasonably in rejecting the so called “tender” of R75 000,00. In the first place the appellant had had no fair reason to dismiss the respondent. In any event by its very conduct of offering the respondent some money, the appellant was, in my view, intimating both to the respondent and the Court a quo that it did not think that this was a case where the respondent deserved no compensation at all. If the position (which the appellant seems by its conduct to have shared) was that the respondent did deserve compensation, then, on the facts of this matter, the amount he was entitled to was R180 000,00. Neither less nor more. If he had sufficient confidence in his case, as he obviously had, he was entitled in those circumstances to reject the so - called “tender” and pursue his claim in court. In these circumstances I agree with the order made by Page AJA that the appeal be dismissed with costs.

RMM Zondo

Judge President

I agree.

C.R. Nicholson

Judge of Appeal

Appearance:

For Appellant:	Adv. M. Pillemer SC
Instructed by:	Sheptone & Wylie Attorneys
For Respondent:	Adv. M.J.D. Wallis SC
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