

ZONDO AJP

I agree

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held at Durban

CASE NO.:DA 17/99

In the matter between:

KYLE LORENTZEN

Appellant

and

SANACHEM (PTY) LTD

Respondent

CONRADIE JA

[1] The respondent is a subsidiary of Sentrachem Ltd, a large manufacturer of chemicals. Sentrachem also has a United States subsidiary called Hampshire Chemical Corporation ('Hampshire'). The appellant was an employee of Hampshire before joining the respondent in Durban as regional manager: marketing. I say 'joining' advisedly because there was considerable dispute in the court *a quo* on whether the appellant was indeed an employee of the respondent. On the last day of the trial it was conceded that he was. The concession was correctly made. He was an employee in terms of the definition of that term in the Labour Relations Act 66 of 1995('the Act') in that certain remuneration

was paid by the respondent in South Africa on his behalf.

- [2] In December 1997 Sentrachem was taken over by Dow Chemicals, an American conglomerate. Dow Chemicals had its own marketing structure. With the take-over, the appellant's post thus became redundant. The appellant was not told of this in the nicest way. There was no consultation on the redundancy of his position. He was told not to come back from his vacation in the USA or, if he did, to do so merely to pack his belongings. The court *a quo* found that there had not, in this respect, been compliance with the consultation provisions of s 189 of the Act. There had been no attempt to reach consensus on appropriate measures to avoid the appellant's dismissal. There is no cross-appeal against the finding which is clearly correct. On this point the only issue is whether the court *a quo* erred in declining to grant the appellant compensation. It was accepted by Mr Winchester, who appeared for the appellant, that in terms of *Johnson & Johnson (Pty) Ltd v Chemical Workers' Industrial Union* (1999) 20 ILJ 89 (LAC) the learned judge *a quo* was required to exercise a judicial discretion as to whether or not to award compensation. The only other point on appeal is whether the appellant is entitled to severance pay.

[3] Although employed by the respondent, the appellant retained significant links with Hampshire. The latter by arrangement with the respondent and for the two years that he was to spend in South Africa continued to pay his salary in the United States; he also remained on Hampshire's pension fund. Hampshire gave the appellant more than that. It gave the appellant an undertaking that if he should at any time be dismissed by the respondent, Hampshire would pay his repatriation expenses and employ him for at least three months and would also employ him for three months if at the end of his contract term he was not given 'suitable ongoing employment' with Sanachem. This was a significant benefit for the appellant. Since, according to him, most employment in the United States is 'at will', he would have been unlikely to find security of tenure if he returned to that country after the expiry of his South African contract, even if he took up, as it was envisaged he might do, a marketing position with Sanachem USA Inc, a US subsidiary of Sentrachem.

[4] Despite the brusque announcement, by a senior manager of Dow Chemicals, that the appellant's position had become redundant, Dow Chemicals was not insensitive to the appellant's predicament. The appellant was offered a position with Dow AgroServices in Indianapolis. He visited the plant there, but did not like the job since it took him back to his old tasks at

Hampshire of financial management and he wished to make a career for himself in marketing. Although the salary was slightly more than his remuneration from Hampshire, it was not sufficient to make up for the loss of his South African benefits. For that reason (and although the additional benefits would in any event have terminated with his South African contract on 31 March 1999) he declined the job offer.

[5] The respondent was also not unsympathetic. Dr Job, the respondent's managing director, assured the appellant that it would honour its contract with him and find him a post for the remainder of his contract period which would have been eleven months. Another Sentrachem subsidiary, UPC, was investigating the feasibility of creating a special post for the appellant, but by the time its managing director telephoned the appellant to discuss the matter, he was told by the appellant that he had accepted the job which Hampshire had undertaken to hold available for him. It would have been better if these initiatives had been taken earlier, but the fact remains that the appellant did have the word of the managing director of the respondent's holding company that its contract with him would be honoured.

[6] The appellant flourished with Hampshire. He remained with it until 30 April 1999 (which is about the time his South African

contract would have expired.) Compared to the \$54 600 which Hampshire had been paying the appellant before his departure for Durban he earned \$ 65 000 p.a. from 1 May 1998 which rose to \$ 78 660 p.a. from 8 March 1999. He left Hampshire of his own accord to take up a more lucrative position elsewhere.

- [7] The learned judge *a quo* did not uphold the respondent's argument that the appellant had merely been redeployed to Hampshire, but he did remark that, seen from the group's perspective, there had not been a dismissal and that the appellant had, despite the different legal entities involved, 'made good within the family or group.' Although this consideration was not one which could alter the fact of the dismissal, it was one which, having regard to the tenor of the judgment, undoubtedly, and properly in my view, influenced the learned judge in the exercise of his discretion. The fact is that, apart from the procedural shortcoming of not having first discussing the elimination of his job with the appellant, the respondent did not do all that badly. An alternative job was promised to the appellant in South Africa, one was offered in Indianapolis and eventually one was accepted in Hampshire. The appellant tried to make out that he alone was responsible for the establishment of the so-called safety net with Hampshire, but I think it is clear that it came about as a result of the inter company connections

and that the respondent played its part in bringing it about.

[8] The choice before the learned judge was a stark one. He could either award the appellant R571 432.00 as a *solatium* in terms of the formula laid down in s 194 of the Act, or he could give him nothing. The appellant's case is that he is entitled to almost R 600 000 for the wrong done to him in not asking him how he thought his temporary job might be saved for another year. He says it is fair that the omission to do that should cost the respondent nearly a year's salary. He lays emphasis on the anxiety which was caused by the prospect of the loss of his job. The learned judge also mentions this aspect. A procedural retrenchment also produces a good deal of anxiety. I do not believe that the manner in which the appellant was treated contributed greatly to it.

[9] The all or nothing choice facing the learned judge *a quo* has once again thrown into sharp relief the dismal state of affairs to which s 194(2), as interpreted in *Johnson & Johnson* (supra) has given rise. I do not wish to be understood as saying that Froneman DJP who gave the judgment for the court could have found a better solution to what has turned out to be a section with major unintended consequences. An award has nothing to do with the magnitude of an employer's industrial relations transgression. It

is a factor of the employee's wage level and the case load at the CCMA or the labour court. It has little of a true *solatium* about it. If the tribunal is busy the solace is large; if it is not, it is small.

[10] The section gives rise to absurd consequences. Take the case of a thief whose dismissal was procedurally unfair. Let us say that he defrauded his employer of massive amounts and the managing director, in a rage, dismissed him without a hearing. If he was a highly paid employee his compensation up to the last day of the arbitration hearing could be substantial. An arbitrator would not find it fair to award him large compensation. If, however, he gives him nothing, which is the only alternative, the result is that the more outrageous a culprit's conduct is, the more readily his unfair dismissal is likely to be overlooked. What happens is that the miscreant, by his conduct, in practice disentitles himself to a fair procedure. The worse the employee behaves, the worse his employer is permitted to behave. The Act in this way encourages unfair employment practices in the case of offenders whose conduct leading up to their dismissal was morally objectionable.

[11] In terms of *Johnson & Johnson* (supra) an employer might escape liability by offering substantial redress. It could do this by offering to reinstate a culprit in his previous position without loss

of benefits, immediately suspending him and holding a disciplinary enquiry. If it does this soon enough, a commissioner might well be persuaded to award the culprit no compensation. But what remedy has an employer like the respondent which has neglected to consult on the abolition of a job? It is supposed to consult *before* abolishing the job. After abolishing it, it is too late to discuss anything. So, too, it is with all the other pre-retrenchment discussions. Such an employer can only wait for an award against him as high as the labour court's case load is long.

[12] Landman J held in the court *a quo* that the appellant was not entitled to a severance payment because he had been unreasonable in refusing to accept an offer of alternative employment with Dow AgroSciences in Indianapolis. I agree with the conclusion of the learned judge and do not wish to add anything to his reasons.

The appeal is dismissed with costs.

CONRADIE JA

I agree

WILLIS JA