IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO. JA 13/00

In the matter between

ALPHA PLANT AND SERVICES (PTY) LTD **Applicant**

and

SIMMONDS R **First Respondent**

LUBBE GR **Second Respondent**

LUBBE R **Third Respondent**

J U D G M E N T

DAVIS AJA:

[121] I agree both with the order proposed by my brother **Goldstein** and the reasoning employed in his judgment. To the extent that the present case deals with a controversial issue in our labour law, I wish to set out my view of the implications of this judgment.

[122] Section 193 (1) of the Labour Relations Act 66 of 1995 ("LRA") provides, inter alia, that "[i]f the Labour Court ...finds that a *dismissal* is unfair, the Court... may –... (c) order the employer to pay compensation to the *employee*."

Section 194(1) of the LRA headed "Limits on compensation" provides that "[i]f 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 or prosecuting a claim."

[123] The architecture of the LRA provides a discretion to the court as to whether to order an employer to pay compensation to the employee in the case of an unfair dismissal. Once a court has decided to exercise its discretion and so order the payment of compensation in a case where the dismissal has been found to be unfair because the employer did not follow a fair procedure, the court is mandated to award an amount of compensation pursuant to a formula set out in section 194 of the LRA.

[124] The relationship between the decision to award compensation and the *quantum* thereof was canvassed in **Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union** (1999) 20 ILJ 89 (LAC) where **Froneman DJP** said the following: "[40] If a dismissal is found to be unfair solely for want of compliance with a proper procedure the Labour Court, or an arbitrator appointed under the

LRA, thus has a discretion whether to award compensation or not. If compensation is awarded it must be in accordance with the formula set out in s 194(1); nothing more, nothing less. The discretion *not* to award compensation in the particular circumstances of a case must, of course, also be exercised judicially.

[41] The compensation for the wrong in failing to give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a *solatium* for the loss of the right, and is punitive to the extent that an employer (who breached the right) must pay a fixed penalty for causing that loss. In the normal course a legal wrong done by one person to another deserves some form of redress. The party who committed the wrong is usually not allowed to benefit from external factors which might have ameliorated the wrong in some way or another. So too, in this instance. The nature of an employee's right to compensation under s 194(1) also implies that the discretion *not* to award that compensation may be exercised in circumstances where the employer has already provided the employee with substantially the same kind of redress (always taking into account the provisions of s 194(1)), or where the employer's ability and willingness to make that redress is frustrated by the conduct of the employee". [at paras 40-41].

[125] These *dicta* have been the subject of a number of different interpretations. It would appear that the desire to reinterpret **Johnson's** case has been caused by the perceived need to escape from what has been referred to as "the rigidities in

section 194". See for example **De Bruin v Sunnyside Locksmith Suppliers (Pty) Ltd** [1999] BLLR 761 (LC) at para 29.

In **Whall v Brandadd Marketing (Pty) Ltd** (1999) 20 ILJ 1314 (LC) **Grogan AJ** attempted to assume that the provision gave greater flexibility to the decision to award compensation in terms of section 194(1) of the Act. Accordingly he said at para [36]: "As s 194(1) prescribes a minimum, establishing what fairness in this context requires must entail comparing what the court considers the employee should have received had there been no statutory minimum with what the employee must receive in terms of that statutory minimum. If there is a substantial difference between the two figures, the court must decide whether denying compensation will be more unfair to the applicant than granting the prescribed compensation would be to the respondent. The assessment of what the employee should have received must, in turn, require the court to examine factors such as the actual patrimonial loss suffered by the applicant in consequence of his or her dismissal, his or her length of service with the employer, his or her prospects of finding alternative employment, the financial position of the employer, and so on..."

[126] This analysis appears to favour an appoach which has the effect that the discretion to award compensation in terms of section 193 should take place after an initial examination of the discrepancy between the amount of compensation awarded in terms of the formula as provided for in section 194(1) and an award of

compensation which would be granted if no statutory formula was applicable and hence were patrimonial loss to be considered to be a key factor in the decision..

[127] In the present case there has been no need to evaluate the amount of compensation in terms of section 194(1) with any comparator based, in part, upon patrimonial loss. In the present case counsel for the respondent did not rely on any patrimonial loss which her clients might have suffered. No evidential basis was laid for such an approach. That however is not the end of the matter. In order to decide whether to award compensation for such an unfair dismissal the court must exercise a judicial discretion. I agree fully with my brother **Goldstein** with regard to the relevant factors of which account must be taken in order to arrive at a decision as to whether to award compensation. Only after a careful examination of these factors, can a court exercise its discretion as to whether in principle compensation should be awarded. Thereafter the *quantum* of the compensation must be determined in terms of section 194.

[128] In exercising a judicial discretion to award compensation in the present case, the manner in which the company sought to deal with each of the respondents, namely with a measure of concern and consideration as well as the relatively short period of employment in which each of the respondents was employed by the company, are critical factors in the determination as to whether to exercise a discretion to award any compensation.

[129] Mr Wilke, who appeared on behalf of appellant, invited the court to reconsider the approach adopted in **Johnson's** case, *supra*. He submitted that a less rigid approach to the formula set out in section 194(1) should be adopted. This is an invitation which must be refused. Section 194(1) is couched in peremptory terms. Once a court has exercised its discretion in terms of section 193(1)(c) to order the employer to pay compensation to the employee within the context of an unfair dismissal pursuant to the adoption of an unfair procedure, it must apply the formula in respect of the amount of compensation which it so awards. There is no basis to be found in the wording of section 194(1) to justify the conclusion to which **Grogan AJ** arrived in **Whall's** case, supra at para [36], namely that a decision in terms of this section involves "establishing what fairness in this context requires [which] must entail comparing what the court considers the employee should have received had there been no statutory minimum with what the employee must receive in terms of that statutory minimum."

[130] Section 194(1) appears to have been designed to remove the need for any evidence as to the nature of the loss suffered by the employee arising out of an employer's decision to dismiss such an employee in circumstances where the latter has followed an unfair procedure. If the court were to follow the approach adopted by **Grogan AJ** in **Whall's** case, *supra* it would, of necessity, involve an examination of evidence as to the nature of patrimonial and other loss suffered by an employee prior to the court determining the *quantum* of such compensation.

[131] **Van Niekerk AJ** observed in **De Bruin v Sunnyside Locksmith Suppliers (Pty) Ltd**, *supra* that section 194 was "drafted with some obvious assumptions about the expeditiousness of the new statutory dispute resolution mechanisms in mind" (at para 31). The section may well have been drafted on the assumption that the period between the date of dismissal and the last day of the hearing of the arbitration or adjudication would be relatively short given the expeditious purpose of the new system of dispute resolution introduced by the LRA. Viewed in this context the purpose of the section was to introduce a mandatory amount of compensation which would be fair in such cases. The fact that the operation of the LRA has not brought about the degree of expeditious dispute resolution upon which the section was initially predicated may well require a legislative change in order to render section 194(1) more flexible. The problem however cannot be solved by an interpretation which is at war with the very purpose of the section as presently constituted.

_____

DAVIS AJA

Date of Judgment: 12 December 2000