

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case no: JA80/99

In the matter between

HPN BRERETON

APPELLANT

and

BATEMAN INDUSTRIAL

CORPORATION LTD

1ST RESPONDENT

EDWARD L.BATEMAN LTD

2ND RESPONDENT

BATEMAN INDUSTRIAL

HOLDING LTD

3rd RESPONDENT

BEL FINANCE LTD

4th RESPONDENT

JUDGEMENT

ZONDO JP

- [1] In this matter Page AJA has prepared a very through and comprehensive judgement which I have had the opportunity of reading. That judgement appears after this one. He has come to the conclusion that the appeal should be dismissed with costs including the costs consequent upon the employment of two Counsel. I agree with that conclusion and the order that he has proposed. Subject to what follows below, I do so for the same

reasons that Page AJA has given.

[2] There are certain matters that Page AJA deals with in his judgement and on which he expresses certain views in respect of which I consider it unnecessary to express views in the light of the facts of this matter and the issues between the parties. I deal with them below.

[3] The reason that was given by the respondents (as the employer party) for the dismissal of the appellant was that they had lost confidence in him. The appellant did not take the attitude that our law did not recognise loss of confidence as a ground of dismissal. The matter was argued before us on the basis that it was permissible for an employer to dismiss a senior employee on such a ground. All the appellant challenged in this regard was the allegation by the respondents that they had lost confidence in him and that that is why he was dismissed.

[4] From the middle of par 34 to par 43 of his judgement Page AJA deals with the question of whether or not an employer may dismiss a senior employee such as a chief executive officer of a company on the grounds that he has lost confidence in the employee if such loss of confidence is genuine and is based on reasonable grounds. He concludes that that is permissible.

I consider it unnecessary to express a view in this matter on whether or not it is permissible for an employer to dismiss a senior employee on the ground that he has lost confidence in such employee. The following are my reasons for this view:-

1. 1. That was not in issue between the parties in this matter. What was in issue between the parties in this regard was whether or not there had indeed been loss of confidence.

Page AJA has concluded, correctly in my view, that there was loss of confidence and that such loss of confidence was both genuine and based on reasonable grounds.

2. 2. The evidence reveals that, as a matter of fact, the appellant failed in the performance of his duties in a number of material respects which, in my view, were such as to render his dismissal substantively fair. This appears in Page AJA=s judgement. This provided a sufficient ground for the appellant=s dismissal without the need to resort to the concept of loss of confidence.
3. 3. This matter is governed by the Labour Relations Act, 1956 (Act no28 of 1956) (Athe old Act=) and this is one of the last few cases that this Court has to deal with under that Act; accordingly any pronouncement on this issue in the context of that Act cannot be justified on the basis that this Court is giving guidance for the future. The law under the old Act was not codified whereas under the Labour Relations Act, 1995, it is, to a very large extent, codified.
4. 4. Great reliance is placed on certain English cases in support of the proposition that the employer=s loss of confidence in an employee is a ground for dismissal if it is genuine and based on reasonable grounds. In my view great caution must be exercised in relying on English decisions in this regard because those decisions were based on a statute that contained a provision to the effect that a dismissal is fair

if it is based on the employer=s reasonable belief that the employee is guilty of misconduct. Our present statute contains no corresponding provision nor did the old Act. Indeed, in our law that approach, which in effect is the reasonable employer test, has been rejected by this Court. (**see in this regard what this Court said per Nicholson JA, in Toyota SA Motors (Pty) Ltd v Radebe & Others (2000) 21 ILJ 340 (LAC) at 342I - 354D in particular at par 49 at 353).**

- [5] It is also not necessary on the facts of this case to decide whether or not the appellant was entitled to be warned of the weaknesses in his performance and to be given an opportunity of remedying the situation before he could be dismissed. This is so because, as it is made very clear in Page AJA=s judgement, Mr Bateman did on more than one occasion draw the appellant=s attention to the problems and urged him to take steps to address the situation and the appellant failed over a lengthy period of time to do so. In those circumstances it doesn=t matter whether or not there had been an obligation on the respondents to draw the problems to the appellant=s attention because, in any event, that is what they did.

- [6] With regard to the requirement of the audi alteram partem rule in this matter, I wish to say no more than was said by this Court in the majority judgement in **JDG Trading (Pty) Ltd t/a Price >n Pride v Brunsdon (2000) 21 ILJ 501 (LAC)** and to emphasise that in this matter it was common cause that the appellant was entitled to the observance of the audi rule before he could be dismissed. A committee was set up to which the appellant made representations. The only issue between the parties in this regard was whether through that committee the appellant was afforded a fair hearing. For the reasons given by Page AJA I am satisfied that, within the context of the observance of the audi rule in the field of employment as opposed to the observance of the audi rule in a court of law, the appellant was given a fair hearing in this matter. Accordingly it is not necessary to express a view on the question of whether or not there was an obligation on the employer to give the appellant a hearing before he could be dismissed.

RMM Zondo
Judge President

I agree.

CR Nicholson
Judge of Appeal

HELD AT BRAAMFONTEIN

CASE NO: JA80/99

-

In the matter IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

between:

H P N BRERETON

Appellant

(Applicant in the Court **a quo**)

and

BATEMAN INDUSTRIAL CORPORATION LTD

First Respondent

(First Respondent in the Court **a quo**)

EDWARD L BATEMAN LTD

Second

Respondent

(Second Respondent in the Court **a quo**)

BATEMAN INDUSTRIAL HOLDINGS LTD

Third

Respondent

(Third Respondent in the Court **a quo**)

BEL FINANCE LTD

Fourth

Respondent

(Fourth Respondent in the Court **a quo**)

JUDGMENT

PAGE AJA

[1] The Appellant applied to the Industrial Court of South Africa held at Pretoria in terms of section 46 (9) of the Labour Relations Act no 28 of 1956 for a determination in the following terms:

“1. Declaring the conduct of the Respondents herein, and dismissal of the Applicant, to be both procedurally and substantively unfair and to constitute an unfair labour practice; and

2. 2. directing the reinstatement of the Applicant retrospectively to the date of the dismissal on terms and conditions no less favourable than those which prevailed at the time of the Applicant’s dismissal;

3. 3. directing the Respondents to do the all things necessary, including, but not limited to, the immediate payment to Applicant of all monies which would have fallen due to him had his employment not been unfairly terminated and the restoration of the Applicant to all his executive and/or director’s positions of all the Respondent companies and their subsidiary companies and to do each and everything necessary to put the applicant back, in all respects, in the position he would exactly have been in had his services not been unfairly terminated by the Respondents; alternatively,

4. 4. that the Respondents be ordered to pay the Applicant compensation equivalent to that which the Appellant would have earned from the date of his dismissal until his normal retirement age;

.... and

5. 5. that Respondents be ordered to take such steps

as are necessary to ensure that Applicant or his nominee receives all the Batecor shares to which Applicant is entitled in January 1997, 1998 and 1999 and any rights arising therefrom and that the Respondents be ordered to underwrite the share price in respect of each of the tranches of shares at a value equivalent to the strike prices set at the ELB 23 May 1996 board meeting referenced herein, alternatively that Respondents be ordered to pay Applicant an amount of at least R12 million in exchange for Applicant signing over the shares he is entitled to in January 1997, 1998 and 1999 to Respondents;

6. 6. costs of suit;

7. 7. further and/or alternative relief.”

[2] The matter was duly heard by Advocate G J Rossouw, an Additional Member of the Industrial Court of South Africa, who, at the conclusion of the hearing, made a determination in the following terms:

“1. The Applicant’s application is hereby dismissed, with costs, on the High Court scale, as between party and party, which costs include the costs occasioned by three Counsel.

2. However, in respect of the days spent by Respondents in the cross-examination of the Applicant regarding his allegations of the rigged-figure case and the related allegations of conspiracy, the costs should be taxed on the highest High Court scale, as between attorney and

own client, which costs include costs occasioned by three Counsel.”

- [3] The Appellant has appealed to this Court against the whole of this determination including the order as to costs.
- [4] The Appellant’s statement of case was a rambling document which largely comprised a recital of the evidence which he proposed to lead. In essence, however, it alleged that the Appellant had been employed by the Respondents in various capacities culminating in his appointment as executive chairman of the first Respondent in 1989. It was alleged that on 19 June 1996 Mr Bill Bateman (“Bateman”), purporting to act on behalf of the Respondents, unilaterally and unfairly, and without any procedure whatsoever having been followed, terminated Appellant’s employment with the Respondents without any cause for such termination existing and without Appellant being advised of any cause and/or reasons for termination of his employment. It was further alleged that, because such termination was unlawful, the Appellant on 24 June 1996 insisted on being reinstated. His employers allegedly refused to comply with this demand and unlawfully suspended him, alleging that Batecor’s poor performance and unacceptable financial results were in themselves evidence of the Appellant’s lack of managerial performance.
- [5] Appellant further alleged that he was then informed that an inquiry was to be held into the poor performance of Batecor and his role therein as executive chairman of Batecor. An inquiry was held before a committee of three members who recommended to the board of Batecor that the Appellant’s employment be terminated

after which the board passed a resolution to that effect. The Appellant alleged that these proceedings subsequent to 19 June 1996 were both procedurally and substantively unfair for various reasons. He based his case firstly on the allegation that the unilateral unfair and unlawful termination of his employment on 19 June 1996 amounted to an unfair labour practice; secondly, on the allegation that the conduct of Bateman, purporting to represent the Respondents, over the period 19 June to 18 July 1996 was unfair and unlawful and constituted an unfair labour practice; and, furthermore, or alternatively, should it be found that the Appellant was not dismissed on 19 June 1996, that the subsequent dismissal of the Appellant during or about August 1996 on both procedurally and substantively unfair.

- [6] The Respondents, in their reply to the Appellant's statement of case, alleged that the Appellant, by virtue of his position as executive chairman of the first Respondent and executive chairman of the third Respondent, was given profit responsibility for the first Respondent and its subsidiaries. They set forth various respects in which he was alleged to have failed properly to have discharged this responsibility. It was impliedly denied that the Appellant's employment had been terminated on 19 June 1996 and alleged that, based on the findings of the sub-committee of the inquiry which sat during July and August 1996, the board of the second Respondent resolved on 16 August 1996 that the Appellant's employment with the Bateman group be terminated on three months' notice to go with a severance package to be negotiated (which was subsequently tendered to the Appellant in the amount of R617 630,00).

- [7] The Respondents denied that their conduct was procedurally or substantively unfair as alleged by the Appellant and pleaded that the termination of the Appellant's employment took place for fair and valid reasons and pursuant to a fair procedure. They accordingly prayed that the Appellant's application be dismissed with costs on the attorney and client scale.
- [8] The hearing of the application before the Court **a quo** took some 120 court days in the course of which the Respondents led 12 witnesses and the Appellant 3 witnesses. The record of **viva voce** evidence and documentary exhibits amounted to over 18 000 typed pages.
- [9] Inevitably, numerous and wide-ranging disputes of fact arose between the parties at the trial. The court **a quo** resolved these disputes in favour of the evidence given by the Respondents' witnesses and rejected the testimony of the Appellant in so far as it conflicted with such evidence. Although counsel for the Appellant criticized the Court **a quo's** formulation of the approach to be adopted to the conflicts of fact, he did not attack the findings of fact made by the Court **a quo**, although he was not prepared to go so far as to concede that they were correct. I find it unnecessary to deal with the reasons for those findings in detail in this judgment: suffice it to say that I am satisfied that no good grounds exist for this Court to interfere with the findings of credibility made by the Court **a quo**.
- [10] The judgment of the Court **a quo**, to my mind, comprises a comprehensive and fair summary of the mass of evidence placed before it in the course of the trial. No point would be served in repeating that recital in this judgment. I accordingly propose only

to set forth those facts which are necessary in order to render comprehensible the reasoning which follows.

- [11] The first aspect which requires to be explained is the corporate structure of the group of companies to which the Respondents belong. Although the structure of the group underwent various changes in the course of its development (which are set forth in judgment of the Court **a quo**), its composition was, at the time of the events to which this appeal directly relates, as portrayed in the organograms appearing at in of the record.
- [12] As there reflected, the holding company of the group is the second Respondent, Edward L Bateman Limited ("ELB") of which Bateman was the chairman and the Appellant a joint managing director together one Dr J Herselman ("Herselman"). ELB was the controlling company of Bateman Industrial Corporation Limited ("Batecor"), the first Respondent, which controlled the equipment arm of the group and also of Bateman Project Holdings Limited ("Batepro") which controlled the construction operations of the group. ELB was also the controlling company of Elbex (Pty) Ltd, which is not of importance in this judgment.
- [13] The Appellant was the chairman and chief executive officer of Batecor whilst Herselman was the executive chairman of Batepro.
- [14] Batecor held all the shares in Bateman Industrial Holdings Limited ("BIH") the third Respondent, which was the operational company of Batecor. The Appellant was the Chief Executive Officer of BIH.

[15] The operations of BIH were divided into three main divisions: the hitech division, of which the Appellant was the chairman; the infrastructure division, of which Mr E Gregor ("Gregor") was the chairman; and the mining and industrial division, of which Mr Max Vey ("Vey") was the chairman.

[16] One of the subsidiaries of BIH in the hightech division was Computer Alliance (Pty) Ltd ("CA"). The Appellant was the chairman of the board of CA whilst the managing director was Mr C Botha ("Botha"). Bateman was also a member of the board of CA. As the affairs of CA constituted the main **casus belli** between the parties, I will have to revert to them in some detail later in the judgment.

[17] The fourth Respondent, Bel Finance Limited ("Belfin"), was another subsidiary of Batecor which conducted its overseas operations and of which the Appellant was also an employee.

[18] During the relevant period Mr J B Hooper ("Hooper") was the financial director of the ELB Group. Non-executive directors of the board of ELB included Messrs Guy Smith ("Smith"), John Hall ("Hall"), A L Leroy ("Leroy") and Dr Louw Alberts ("Alberts"). Alternative directors of the board of ELB included Mr D B Smith ("Dudley Smith") and Vey.

[19] Office-bearers on the board of Batecor included, in addition to the Appellant, as executive directors Messrs Vey, Gregor, Graham Jones ("Jones"), Don Passmore ("Passmore") and Dudley Smith. Alternative directors on the board of Batecor included Mr Fraser Russell ("Russell"), Mr D Spirou ("Spirou") and Hooper. Bateman

and Herselman were amongst the non-executive directors of Batecor, whilst Vey, Gregor, Spirou and Jones together with the Appellant formed the executive committee ("excom") of Batecor.

[20] It will next be necessary to refer briefly to the history of the Appellant's association with the Bateman group and, in particular, to his participation in a management share scheme in Batecor, which played a major role in the dispute between the parties. The Appellant was recruited by first Respondent on 7 February 1978 as general manager of its general industries division. The Appellant had at that time not only an impressive academic record but was an accomplished and experienced company executive. After he had been with the group for ten years he was appointed joint managing director of ELB and shortly thereafter became chairman of the entity which subsequently became Batecor. He held these positions, **inter alia**, until his employment was terminated.

[21] The share scheme to which I have referred was, in its simplest terms, a scheme whereby officers or other employees of the group could be offered shares for a nominal payment which would then be held in trust until the purchaser became entitled to have them released into his ownership. His right to such release was contingent upon the fulfilment of two conditions: the first being that he should remain in the employ of the group for the period prescribed in the trust deed and the second being that the earn-out stipulated in the trust deed must have been achieved over that period. The scheme was accordingly designed as a incentive to encourage both continuity of tenure and performance.

[22] The scheme was created in terms of a deed of trust executed in

December 1988 by Elbquip Holdings (Pty) Ltd (which was the company designated to hold the shares in trust until they were released to the ultimate purchasers) as the party of the first part, ELB as the party of the second part and Bateman, Anthony Garth Fletcher ("Fletcher") and Ian Alan Richard Thompson (being the prospective first trustees) as parties of the third part. This deed appears in the record, and need not be set out in full in the judgment. Provisions which are of importance, include the following.

- [23] Shares could only be purchased by an employee by accepting an offer of those shares made to him by the trustees. Upon acceptance of the offer by him he would become contractually bound by the provisions of the deed of trust governing such transactions. In terms thereof he was entitled to pay for the shares on acceptance but they would remain vested in the trust unless and until released to him in terms of the provisions of the deed. Those provisions stipulated that 40% of the shares might be released to the purchaser after five years and the remaining shares might be released in five tranches of 12% each for each additional year of service completed.
- [24] Clause 13.2 of the trust deed made provision for what should happen to shares allocated to a particular executive in the event of his employment being terminated prior to the expiry of the ten-year period. Shares to which he was entitled because he had completed the requisite period of service could be released to him provided that he had paid or did pay for them. The remaining shares, which could not be released to him because he had not completed the balance of the requisite time period, were required to be repurchased by ELB.

Such repurchase was to take place at the lesser of the price which they had been issued and the market price at the relevant time, subject to the power of the trustees in their discretion to increase the purchase price to not more than middle market price on the JSE at the time.

[25] On 23rd January 1989 the trustees invited the Appellant to apply for the purchase of 600 000 shares in terms of the scheme at a price of R1,00 per share. This offer was duly accepted by the Appellant before the expiry date of 31 January 1989, and the purchase price paid. At the time of the termination of the Appellant's employment he had accordingly qualified for the release to him of the tranches of 40%, 12% and 12% of the shares which fell due at the end of January 1994, January 1995 and January 1996 respectively: a total thus 64% of the shares in question.

[26] The unreleased tranches for January 1997, January 1998 and January 1999, comprising 36% of the shares and amounting to 3.492.378 shares in total are those claimed by the Appellant in the prayer referred to earlier in this judgment.

[27] The Bateman group had, until approximately the beginning of 1992, traditionally and primarily served the mining and resources industries. At that stage, and in the light of the mining industry reducing the scale of its operations and expenditure, the Appellant deemed it necessary for Batecor to diversify its operations and identified information technology ("IT") as the field in which such diversification should be implemented. The hightech division of Batecor was already in existence and the Appellant recommended to the boards of Batecor and ELB that

they extend it by entering the field of IT, which recommendations were accepted. As a result, in February 1992 BIH required a majority stake in CA and also a stake in a company called Workgroup Holdings (Pty) Ltd, both of which companies were active in the IT field and thereupon formed part of Batecor's hightech division under the control of the Appellant.

[28] CA was purchased **inter alia** because it sold computer network systems which comprised a branch of IT in which large profit margins could be achieved. It was also involved, however, in the sale of desk-top computers on which the profit margins are relatively small. Furthermore, the speed with which computer technology was advancing rendered existing stock obsolete within a short time, so that it was a matter of some nicety to achieve a balance between holding sufficient stock to fulfil orders and not being saddled with obsolete and therefore unsaleable stock. Despite the dangers inherent in this procedure, however, CA from late 1993 concentrated on the sale of personal computers at the expense of its networking activities.

[29] When CA was acquired it initially remained under the control of its original managing director, Botha. The relationship between the Appellant and Botha deteriorated, however, and Botha ultimately resigned, to be replaced by Passmore. Problems which arose during Passmore's period of office, however, eventually led the Appellant to reinstate Botha. Passmore was ultimately requested to leave.

[30] From the time of its acquisition CA showed substantial and increasing losses which were, according to the evidence

adduced by the Respondents, attributable in the main to the lack of proper financial controls and its excessive holdings of stock.

- [31] The unsatisfactory performance of CA inevitably affected adversely the performance of the hightech division of Batecor of which it was a part and thus the performance of Batecor itself. Jones, the financial director of Batecor, presented in evidence detailed figures relating to these companies over the relevant period which reflected the scale of the deterioration. Although the latest figures he gave differed to some extent from those available at the time when the Appellant's services were terminated, because the accounts had not yet at that stage been audited, those differences are not sufficient materially to affect the position. The figures he presented showed that for the year ended June 1994 the hightech division in Batecor budgeted for a profit of approximately R6, 9 million but it achieved a loss of R352 000. For the year ended 1995, the hightech division budgeted for a profit of R9,3 million and achieved a loss of just over R1 million. For the year ended June 1996, the hightech division budgeted for a profit of R14, 3 million but achieved a loss of R32,6 million.
- [32] The figures for Batecor for the same three years showed in 1994 and 1995 it achieved a profit substantially less than that for which it had budgeted whilst for the year ended June 1996 it budgeted for a profit of R30,2 million but reported a loss of R22 million.
- [33] The figures presented by Jones further demonstrated that the unsatisfactory performance of CA was the main contributor to the losses in the hightech division and the consequent losses to Batecor. Thus, for the year ending June 1996 CA budgeted for a profit R7,7 million but reported a loss for the period of R34,5

million. Furthermore the BIH/Batecor group's total investment in CA had grown by 1996 to a disproportionately large amount of its total funds, which Jones justifiably described as a very unhealthy position.

[34] It was primarily upon these losses incurred by CA whilst the Appellant was at the helm of the hightech division that the Respondents relied as a justification for terminating his employment. It was contended that his failure to detect, control, stem and rectify the causes of those losses constituted reasonable grounds for a loss of confidence in his fitness to occupy the position which he held and so justified the termination of his services. Before considering this proposition in detail, it will be necessary to advert to the law regulating the requirements for fairness in the termination of the employment of employees in senior managerial positions and, in particular, chief executive officers.

[35] Although the basic requirements for substantive and procedural fairness in the dismissal of employees remain constant across the whole spectrum of employment, common sense dictates that they need to be adapted to the nature of the employment relationship and the type of dismissal to which they are being applied. The law will not insist upon the observance of norms and procedures which are inappropriate to, or unnecessary in the particular situation under consideration.

[36] The nature of the employment relationship between a chief executive officer and the chairman and board of the company which employs him differs in several respects from that between an employer and an employee whose mandate is more

circumscribed and calls for less independent initiative. He is not told what to do by his employers; he is, in essence, employed himself to make the decisions necessary for the successful and profitable operation of the company or companies under his control. He is required independently to see the necessity for such a decision, to make the correct decision called for, and to ensure that it is effectively implemented. He is employed in that position because he has the insight, ability and experience to do so, and his remuneration is ordinarily proportionate to the responsibility of that task. On the other hand, because of the gravity of the responsibility he bears, and the dire consequences which can ensue if he fails properly to discharge his duty, the standard with which his performance must comply is an exacting one.

[37] Because of the difficulty of establishing precise criteria against which the individual actions of such an employee can be measured, the only practical test by which his performance can be assessed is the efficacy of his management of the company or companies under his control, measured in terms of their success and profitability. For the same reason, the decision as to whether the employee holding such a position is unsuited to continue in that position is that of the employer, provided only that his decision is genuine and based on reasonable grounds.

[38] There is a dearth of authority on the point, but some support for the views expressed above is to be found in the judgment of CONRADIE JA in **JDG Trading (Pty) Ltd t/a Price 'n Pride v Brunsdon (2000) 21 ILJ 501(LAC) at pp 517-8 paras [73] and [74]**, where the learned Judge said:

“I would think that where an employer on reasonable grounds comes to the conclusion that a senior management employee is unsuited to the position which he holds, the scope for having such a conclusion overturned in a court of law is small. It is in the highest degree desirable that a employer should, in the interests of efficiency, be entitled to choose with as much freedom as is compatible with the honest exercise of a discretion, who it wants at or near the helm of its enterprise. Qualities like leadership, resolve, business acumen, judgment and effective administration are not readily provable in a court. A deficiency in such qualities is not readily provable either. I agree with what is said in Smith & Wood **Industrial Law (6 ed) at 405:**

“In the realm of dismissal for incapability, it is important that the employer’s business should not have to suffer, to the detriment of all concerned, through the ineptitude or inefficiency of a particular employee. However, it is also important that the employee whose work is causing dissatisfaction should be treated fairly. The question for the tribunal is whether the employer has satisfied them that he genuinely believed on reasonable grounds that the employee was incapable.””

Much has been made by Counsel for the Appellant of the fact that this passage appears in a minority judgment, but a reading of the whole report reveals that it was not on this point that in CONRADIE J A differed from the other members of the Court, and that what he said in the passage

quoted is entirely compatible with the **ratio** of the majority judgment.

[39] The proposition that an employer is entitled to set the standard it requires its employees to meet and that the court will not intervene unless those standards are grossly unreasonable, was affirmed in **Empangeni Transport (Pty) Ltd v Zulu (1992) 13 ILJ 352 (LAC)** and in **Eskom v Mokoena [1997] 8 BLLR 965 (LAC) at 797 E – F**. See also **Palmer v S Mazor Aluminum CC 1997(2) 3 LLD 108**.

[40] The **Eskom** and **Palmer** cases are also authority for the further proposition that it is within the employer's province to make the assessment whether or not those standards have been met and again the court will not interfere, unless the assessment is grossly unreasonable.

[41] The distinction drawn between employees who occupy senior management positions and ordinary employees is also drawn by the learned authors of Le Roux & van Niekerk, **The South African Law of Unfair Dismissal**, at pp 80 – 81, in which they say the following:

“That the general managerial employee is no less deserving of protection against unfair dismissal than ordinary employees seems clear. Nevertheless, there are categories of senior managers who, by reason of their seniority and relationship with other senior staff or the owners (or controllers) of the business occupy a completely different position to that of ordinary employees. In this situation aspects

such as personality conflicts, management style, and simple lack of confidence in the ability or willingness of the manager to do the job in the way the owners or senior colleagues desire could justify dismissal. The use of formal procedures prior to dismissal also seems to be less relevant in these circumstances. Here the court should be less willing to intervene unless there is clear evidence of bad faith or improper motives. In most cases these employees will have had the necessary ability to negotiate favorable conditions of service and might prefer to rely on any contractual remedies they may have.”

[42] The position laid down in these authorities also accords with the approach in England as set out in **E C Cook v Thomas Linnell & Sons, [1977] IRLP 132**, a decision of the Employment Appeal Tribunal which was referred to by Counsel on both sides in this case, and which seems particularly apposite. The relevant portion of the headnote (which accurately summarises the decision) reads as follows:

“The appellant had been fairly dismissed from his post as manager of the Respondents’ food depot on grounds of the employers’ genuine loss of confidence in his ability. Although employers must act reasonably when removing from a particular post an employee whom they consider to be unsatisfactory, it is important that the operation of unfair dismissal legislation should not impede employers unreasonably in the efficient management of their business. The quality of management is an imponderable which it may be difficult to assess precisely. Therefore, when

responsible employers have genuinely come to the conclusion over a reasonable period of time that a manager is incompetent, that is some evidence that he is incompetent, although it is then necessary to look to see whether there is any other supporting evidence. In the present case, the employers had quickly and genuinely formed the impression that the appellant was not measuring up to his new post. This was confirmed by a fall-off in trade. Whilst it could not be positively established that the fall-off in trade was directly attributable to the appellant's incapacity as a manager, where a fall-off in trade is of genuine concern and continuing, it is reasonable for employers who have no confidence in their manager to come to the conclusion that he shares some responsibility for it.

The issue in the present case was not whether the employer had affirmatively established that the fall-off in trade was due to the appellant's incapability and in suggesting in his dissenting opinion that para. 6 (1) AND (2) of Schedule 1 to TULRA required employers to prove that the comparative failure of the employee's depot was due to his lack of skill, the Industrial Tribunal Chairman had misdirected himself. Para. 6 (1) and (2) is concerned only with the identification of the reason for dismissal. That reason having been identified, it is then for the employers to show that in the circumstances, having regard to equity and the substantial merits of the case, they acted reasonably in treating that reason as a sufficient reason for dismissing the employee."

[43] I am satisfied on the strength of the foregoing that the employment of a employee in a senior executive position such as that occupied by the Appellant can be legitimately and fairly terminated by his employer on the ground that the employer has lost confidence in the employee's ability to perform his duties effectively, provided only that such loss of confidence is (a) genuine and (b) based upon reasonable grounds. What will constitute reasonable grounds clearly depends upon the circumstances of each case, but without derogating from the generality of the foregoing, I venture the view that a failure of the part of the employee effectively and successfully to discharge his duties would constitute such grounds unless he were able to show that such failure was due to circumstances beyond his control.

[44] I turn next to an examination of the procedural requirements for the fair termination of the employment of a senior executive such as the Appellant. The first question to be considered is whether it is incumbent upon his employer to warn him that his performance is falling short of the standards required of him and so afford him a opportunity to rectify the position before steps are taken to terminate his employment.

[45] It has been recognised by the courts that in respect of this requirement, too, the position of a senior manager differs from that of an ordinary employee. Because of his situation and the overall view of the business which he enjoys as a result thereof, he will ordinarily be aware of the shortcomings in his performance and the adverse consequences to the business resulting therefrom. He will likewise himself appreciate the necessity to remedy the position without it been drawn to his attention by

another. It would be pointless to insist upon his being warned of a situation of which he must already be fully aware.

[46] A second situation recognised by the courts in which the necessity for a warning may be dispensed with is where the poor performance of the officer concerned is so gross, and its consequences so serious, that it would be unfair to require the employer to suffer any further delay in terminating his employment.

[47] Recognition of these exceptions was first extended by the Industrial Court in **Stevenson v Sterns Jewellers (Pty) Ltd (1986) 7 ILJ 318** at p. 324 F – I where FABRICIUS A M stated:

“I appreciate one should not easily and without a certain reservation transplant foreign legal principles onto ours – very often they are based on particular statutes and cannot readily be read outside that context. However, the following seems to be an apposite dictum:

“If an employee is not measuring up to the job, it may be because he is not exercising himself sufficiently or maybe because he really lacks the capacity to do so. An employer should be very slow to dismiss upon the ground that the employee is incapable of performing the work which he is employed to do, without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity of improving his performance. But those

employed in senior management may by the nature of their job be fully aware what is required of them and fully capable judging for themselves whether they are achieving that requirement. In such circumstances, the need for warning and an opportunity for improvement is much less apparent. Again, cases can arise in which the inadequacy is so extreme that there must be an irredeemable incapacity. In such circumstances, exceptional though they are, a warning and opportunity for improvement are of no benefit to the employee and may constitute a unfair burden on the business.”

See **James v Waltham Holy Cross Urban District Council (1973) ICR 398.**”

[48] The first exception recognised in the **Stevenson’s** case was approved by the Labour Appeal Court in **Blue Circle Materials (Pty) Ltd v Haskins (1992) 1 LCD 6 (LAC).**

[49] These decisions have also been approved and applied by the Labour Appeal Court as constituted under the present Labour Relations Act in **Somyo v Ross Poultry Breeders (Pty) Ltd [1997] 7 BLLR (LAC) at pp 866 C – F** where MYBURGH J P said the following:

“An employer who is concerned about the poor performance of an employee is normally required to appraise the employee’s work performance; to warn the employee that if his work performance does not improve, he might be dismissed; and to allow the employee a reasonable opportunity to improve his

performance: **Craig v Rubdec (Pty) Ltd t/a Guys and Girls (1992) 1 LCD 29 (IC); James v Waltham Holy Cross Urban District Council [1973] IRLR 202.** Those requirements may not apply in two cases which are relevant to this matter. The first is the manager or senior employee whose knowledge and experience qualify him to judge for himself whether he is meeting the standards set by the employer: **Stevenson v Sterns Jewellers (Pty) Ltd (1986) 7 ILJ 318 (IC) at 342 F-G; Blue Circle Materials (Pty) Ltd v Haskins (1992) 1 LCD 6 (LAC).** The second is where “...the degree of professional skill which must be required is so high, and the potential consequences of the smallest departure from that high standard are so serious, that one failure to perform in accordance with those standards is enough to justify dismissal. **”Taylor v Alidair Limited [1978] IRLR 82.”**

[50] Counsel for the Appellant disputed that the **Somyo** decision correctly reflected the law and quoted a number of earlier cases in which the courts did require senior employees to be warned of the deficiencies in their performance and to be given an opportunity to remedy them before being dismissed. He sought to distinguish the **Somyo** decision on the grounds that the dicta therein relied upon by the Respondents and applied by the the Court **a quo** were not couched in peremptory terms in that it was said that the requirement may not apply to the cases under consideration.

[51] A reading of the whole decision the **Somyo** matter, however, reveals that the employer did not satisfy the requirements of appraisal, warning and opportunity to improve, which would apply

in the case of an ordinary employee, and that that omission was held not to render the dismissal of the employee unfair because he was himself aware of his failure in performance and its potential consequences. By not couching the exception in absolute terms the Court was doing nothing more than leaving the door open for a warning to be required where fairness demanded it despite the fact that the employee occupied a senior managerial position: as, for instance, where through no fault of his own he was in fact unaware of the shortcomings in his performance and their consequences. I am satisfied, however, that the intention and effect of the decision in **Somyo's** case was to lay down that it is unnecessary to warn a senior managerial employee of the shortcomings in his performance and the consequences thereof when he is already aware, by virtue of his position, of those shortcomings and consequences. The decision is furthermore binding on this Court unless it has been shown to be clearly wrong, which it has not.

[52] The next aspect of the procedural requirements for the dismissal of a senior managerial employee which has to be considered, is the necessity of affording the employee a hearing before terminating his employment on the grounds of his incapacity.

[53] It is never been the case for the Respondents, nor was it the view of the Court **a quo**, that the Appellant was not entitled to a proper hearing before any decision to terminate his employment was taken. The contention for the Respondents was, however, that there was a difference in the form which such a hearing was required to take in the case of the alleged incapacity of a senior managerial official as opposed to an allegation, for example, of misconduct on the part of a ordinary

employee. That such a distinction exists was held in the majority judgment in **Brunsdon's** case (**loc. cit.**) at para. [61] and [62], where ZONDO AJP (as he then was) said the following:

“Some argument was also advanced by the Appellant’s Counsel that the Respondent was employed as a senior manager and that he knew what his shortcomings were. That an employee is a senior manager does not, in my view, give the employer the licence to dispense with the observance of the **audi alteram partem** rule. Such an employee is also entitled to the observance of the **audi alteram partem** rule. What may be relaxed in the case of a senior manager may be the form which the observance of the rule may take (see what Vivier J A said in **Unilong Freight Distributors (Pty) Ltd v Muller (1998) 19 ILJ 229 (SCA) at 238 (A-B).**“

The opportunity which is given to a senior employee must still meet at least the two basic requirements of the **audi alteram partem** rule, namely, he must be given notice of the contemplated action and a proper opportunity to be heard. The reference to “notice of the **contemplated** action necessarily implies that the action has not been decided upon finally as yet but that it is one which may or may not be taken depending on the representations of which the affected person may give.”

- [54] It is the submission of the Respondents that a senior managerial employee, faced with an allegation that his employer has lost confidence in him by reason of his inadequate performance or incapacity, should be afforded a hearing at which he should be

given the opportunity to challenge whether the alleged loss of confidence is (a) genuine and (b) based upon reasonable grounds. He should further be afforded the opportunity to debate what steps should be taken if the loss of confidence proves to be genuine and well-founded.

[55] The Appellant has not seriously challenged this formulation of the requirements of the hearing to which a senior managerial official is entitled: the gravamen of his complaints in this regard is that the hearing which he was accorded failed to satisfy any of those requirements.

[56] I proceed now to a summary of the evidence relevant to the application of these principles in the present case.

[57] The standards with which the Respondents required their chief executive officer to comply were described by Bateman before the Smith Committee (with which I will deal in detail in a later stage) and reaffirmed by him in his evidence at the trial. Important statements made by him in this regard include the following.

“Any business, ELB as well, and I as well, require a CEO to run his operation profitably and efficiently for the long term. It means that the shareholders need a good return on their funds that they have invested in the business and it means that he must exercise all those qualities of management, of leadership, motivation, control which are required to achieve this.”

“.....In fact, one of the most important attributes of the Chief Executive Officer is that because he is a position where his skills are meant to be multiplied by other people that he puts in place, one of the most important things is that he has got to have the ability to make sure that things get done.”

“The end result of the many talents he has to bring to his task is measured in the audited accounts over a number of years. These numbers are the measure of his success or otherwise in fulfilling the demanding requirements of the CEO's spot.”

[58] In an analogy which provoked a great deal of cross-examination, Bateman likened the position of a CEO to the head coach of a football team whose position depended on and was measured by the results which he produced. In describing the relative functions of the board of a company and its CEO, Bateman said the following.

“The shareholders expect a profit from their investment and look to the elected representatives to look after their interests. These in turn watch the appointed CEO.

One of the most important duties of the board is to continually review, implicitly or explicitly the performance of the CEO. He is the man upon whom the responsibility lies to look after the shareholders by way of increasing their wealth, not diminishing it. If they have to tell him how to do his job then he is the wrong man.”

[59] Bateman claimed in the light of the foregoing that he was not entitled but obliged to take the action which he did. He said:

“When a CEO has nearly put the company under and then appoints a person to the major trouble-spot with inappropriate experience, then that to my mind is a watershed and action must be taken. If I had not taken action, then I am sure the board of ELB would have taken me to task exactly because we have strong non-executive directors as required by the King Report.”

[60] He stressed, however, that the primary responsibility for operating and running the company rested with the CEO and that he could not shift that responsibility to the board of directors. He said:

“The fact that the board of directors thinks that he is saying sensible things does not absolve the Chief Executive of making sure that the right things happen. It is often quite easy to say, “this is the problem; this is the obvious solution.” The difficult thing, the thing that requires the talents for which people are paid large sums of money, is to make it happen, to make the business successful. To say the it is the fault of the board that the Applicant was unable to make a success is only true in respect that they did not replace the Applicant at an earlier time.”

[61] This formulation of the duties of a CEO was supported in the testimony of Hall, who spoke of the authority of many years of experience as one of South Africa’s leading corporate executives. He stated that the chief executive officer’s job was to plan, lead,

organise and control the company so as to ensure that profit targets are met and, importantly, to ensure that in the final analysis, shareholders see and have confidence in him and the company: confidence that he will protect and increase their assets in the company. In order to fulfil this task he was given the necessary mandate and power by the board. He was obliged to use those powers to ensure that the proper people with the correct experience were in place in the company; to ensure that proper systems to protect the assets of the company were in place; to ensure that the organisation of the company was so structured as to protect its assets, and to ensure that those assets were in fact protected.

- [62] He stressed that, just as it was not open to a CEO to shift the responsibility which rested upon him to the board of directors, it was equally no answer for him to blame the performance of the persons under him, whom he had appointed and whom he controlled, for continuing lack of performance by the company. As he said, with reference to the Appellant's endeavours to blame the people under him for the problems,

“Eventually one has to say that he is no longer part of the solution, he is now becoming part of the problem, that he has had adequate time and he has had the confidence of the board to actually resolve the problems, put a proper team in place and be effective. This sticks in my mind all the time, the responsibility to be effective, and my view was that Mr Brereton had not been effective. He had all the power, all the mandate and he had not used these in a manner which resulted in an effective resolution of the problems, and that was his responsibility.”

[63] These criteria have been criticised by counsel for the Appellant as being arbitrary and rendering the employment a CEO dependent upon the whim of the board. I do not agree: they constitute as objective a set of standards as can be formulated when dealing with a matter so difficult to assess objectively. Whilst they are undoubtedly stringent, that stringency is fully in keeping with harsh realities of the business world in which the rewards for success are commensurate with the high standard performance required to achieve such success and severity of the penalties for failure are commensurate with the seriousness of the consequences for failing to do so. I am satisfied that the criteria adopted by the Respondents were reasonable in the circumstances of the case, particularly bearing in mind the authorities referred to earlier in this judgment to the effect that it lies within the province of the employer to set its own standards for the performance of managerial employees and that the court will not interfere with those standards unless they are grossly unreasonable.

[64] Before dealing with the respects in which the Respondents contended that the Appellant fell short of those standards, it is important to stress that the grounds upon which they relied did not comprise misconduct by the Appellant but a lack on his part of the capacity to comply satisfactorily with those standards required of him properly to perform his duties and a consequent loss of confidence in his ability to do so. This distinction is of importance, particularly when one comes to consider the procedural requirements for terminating his employment on these grounds.

[65] The cornerstone of this portion of the Respondent's case consisted of the disastrous performance of CA during the period when it was under the control of the Appellant. The Appellant bitterly contested the figures upon which the Respondents based their assessment of his performance and went so far as to allege that they had been falsely manipulated or "rigged" so as to enable Bateman to terminate his employment and appoint Bateman's son-in-law, Fletcher, in his place. In support of his allegation that the alleged loss of confidence was neither genuine nor based upon reasonable grounds, he not only disputed any failure on his part to perform satisfactorily, but also relied upon a number of incidents which occurred during his tenure of office which, he contended, demonstrated a belief in his ability and performance at odds with the alleged loss of confidence.

[66] The dispute about the figures relating to the performance of CA over the relevant period occupied an inordinate amount of time during the hearing and accounted for a vast number of the exhibits with which the record has been burdened. At the end of the day, however, it clearly emerged that the Appellant had no valid grounds for disputing the accuracy of those figures, and he was constrained to admit as much. I need therefore do no more than refer to the summary of Jones's evidence given earlier.

[67] Jones testified that one of the major problems in CA was the uncontrolled escalation in stock held by it. He prepared various schedules reflecting the stock position in CA from 1993 to 1996. The figures there given reflect the gross value of stock which comprises with both inventory and work-in-progress. They reveal

that the gross value of stock in CA increased from R10 million in 1993 to R16 million in 1994 and R35,8 million in 1995. The final figure for June 1996 was R32,1 million. These escalating stock figures were accompanied by a corresponding increase in provision for obsolescence which grew from R132 000,00 in 1993 to R1,4 million in 1994, R2,7 million in 1995 and R18,2 million in June 1996. This last figure represent 57,7% of the gross value of the stock then held. It was the testimony of Jones that these figures reflected bad stock procurement and bad stock management.

[68] Jones also testified that the operating expenses in CA rose from R7,4 million for the year ended June 1995 to R16,4 million for the year ended June 1996: a increase of 120%.

[69] The evidence of Jones as to the adverse effects which the performance of CA had upon Batecor during the year ended June 1996 is of particular significance to demonstrate not only the extent of the problem but also the Appellant's reaction to it. It will be recalled that Batecor initially budgeted for a profit of R30,2 million for the year in question. The Appellant had already claimed in a preliminary profit announcement and dividend declaration in September 1995 that decisive action had been taken to remedy the problems that occurred in CA and that they looked to the future with confidence. He repeated this claim in the 1995 annual report and expressed the expectation that the group would resume its growth pattern in the following financial year. He also stated that the degree of the growth was largely dependent on the recovery of the IT sub-group which was currently the focal point of the executive management's effort and support. Despite this sanguine forecast, the Batecor interim

report for the 6 months ended 31 December 1995 (signed by Appellant on 15 March 1996) revealed a loss for that period of R5 million. These figures included restructuring costs and stock provision of R9,2 million in the Computer Alliance group. Despite this loss, the Appellant stated in the interim report:

“Having taken the necessary corrective action in under-performing operations, and given the strength of performance in other divisions, it is anticipated that group profitability will improve considerably in the second 6 months. Whilst it is anticipated that the full year results may be up to 20% lower than the R16,548,000 achieved in 1995, it is possible, with the successful completion with the contracts, to equal or exceed those results”.

This 20% reduction would still have left the group profits at approximately R13,2 million, for which it had originally budgeted.

[70] It is difficult to appreciate on what the Appellant could have based this optimistic forecast in the light of the loss sustained in the first 6 months of the year. One is compelled to the conclusion that he either did not properly appreciate the position or was deliberately misleading the shareholders as to the group's prospects. As Jones stated in evidence, in order to achieve this target, the group would have had to have made a profit of R19 million for the second 6 months; whereas at the time when the Appellant signed the report an additional loss of R2 million had been incurred in the first 2 months of 1996.

[71] These losses in Batecor necessitated a revision of the forecast for BIH, its operating company. On 18 April 1996 Jones

presented a revised forecast for BIH reflecting a loss of almost R2 million. In the week preceding 10 May 1996 he prepared a further revised forecast predicting a loss of R3,221 million. He also prepared a memorandum to be presented to the BIH executive committee together with this forecast on 10 May 1996 which drew attention to two features which further aggravated the position in CA. The first was that there was a necessity further to increase the stock provision in CA because of the deteriorating position to which I have already referred. The second was that no interest had been charged on the loans made by BIH to CA up to that stage, and Jones was concerned about the tax implications of this omission which he considered should be remedied.

[72] This memorandum is of importance firstly, because it refutes the Appellant's suggestion that the subsequent steps taken along the lines of these recommendations were designed to create an artificially adverse position in CA for which he could be blamed. Secondly, the Appellant's reaction to the memorandum is highly significant. He instructed Jones not to table it at the BIH excom meeting on 10 May 1996 because they had just lost the arbitration proceedings relating to Workgroup Holdings and Appellant expressed the view that they had had enough bad news for the day.

[73] A meeting of the Batecor board was scheduled for 22 May 1996 and Jones was charged with the preparation of the documents to be laid before the board. The Appellant was at that stage in possession of his memorandum forecasting a loss of R3,221 million but instructed Jones once again to omit this forecast from the papers and include the old forecast of R10 million profit,

saying that he would address the R3 million loss forecast verbally. He claimed that this omission was necessary in order to preserve confidentiality.

[74] When this was put to the Appellant in cross-examination he initially claimed that Jones was giving false evidence but subsequently admitted that he had instructed him to withhold the memorandum from the board and claimed that he had verbally informed the board that their anticipation was a loss of R3 million and not a profit of R3 million. Reference to the minutes of the meeting, however, reveal what he in fact said was that the forecast in the board's papers was not in line with what management believed would happen and that it now appeared that the forecast for the year could vary from a loss of R3 million to a profit of R3 million.

[75] The adverse effects of excessive holdings of stock in CA and the consequent losses due to its becoming obsolete, were exacerbated by the discovery of two substantial stock deficiencies for which the Appellant could not give a satisfactory explanation. The first, which was revealed in June 1994, was a stock shortage of at least R7 million in CA. The magnitude of this shortage is demonstrated by the fact that the total stock of CA at the time was supposed to be approximately R16 million. It was not suggested that this shortfall was due to any short delivery of stock when CA was taken over by Batecor; and, although the shortage was said to be due to theft, thereafter the Appellant conceded in evidence that the cause remained unknown.

[76] Although the Appellant claimed that controls then put in place to prevent a recurrence of the loss, a further stock shortage of R7,3 million was revealed in the middle of June 1995. Once again, no satisfactory explanation for this massive shortfall was forthcoming, and all that the Appellant could say about it in evidence was that it was due to a “different aspect” of the lack of financial controls.

[77] The foregoing is by no means a exhaustive catalogue of the manifestations of a lack of proper administration and control in CA under the Appellant over the relevant period; but it is sufficiently illustrative of the situation for purposes of this judgment, and no point would be served by a recital of every shortcoming revealed by the evidence.

[78] Another aspect of the Appellant’s performance which elicited criticism and which allegedly contributed to the poor results in CA was his failure to relate properly to the persons to whom he entrusted administrative functions under him, and his poor judgment in selecting unsuitable persons for those positions. Thus, his relationship with the chief executive of Workgroup Holdings, Dana Buys, and with the managing director of Computer Alliance, Botha, was strained and unsatisfactory from the time that Batecor acquired a interest in those companies. As Bateman expressed it in his evidence, he treated them not as partners but as adversaries. The problems with Buys led to litigation which Batecor lost whilst those with Botha led to the latter’s resignation and further litigation, although Botha was rehired by the Appellant some two years later.

[79] After Botha's resignation, one, Greeff, was given greater responsibilities in controlling the finances of CA whilst Passmore was appointed to replace Botha. Both these appointments were made by the Appellant who, by virtue of his position, had the right to "hire and fire" the executives under him and his decisions were presented to the board as a **fait accompli** and accepted by it without question. Although Appellant attempted to shift the blame for Passmore's appointment onto Fletcher, whose friend Passmore was, and who had suggested him as a possible appointee, it was clear that the ultimate decision to appoint him and the responsibility for it rested with the Appellant.

[80] Both these appointees proved to be ill-suited to the posts to which they were appointed. Greeff left the company in about November 1995 after a threatened disciplinary inquiry and Passmore suffered the same fate at about the same time. It was during Passmore's period of office that extensive and unnecessary purchases of stock took place which contributed substantially to the unsatisfactory stock position referred to above.

[81] After Passmore's departure Bateman requested Fraser Russell to attempt to rehabilitate CA, which was at that stage losing money at a alarming rate.

[82] He also made other suggestions to improve the administration of the company. One of the major sources of dissatisfaction with the Appellant's performance, apart from the identity of his appointees, was his tendency to leave the immediate control of the company in the hands of those appointees and to avoid direct "hands-on" involvement himself. What Bateman suggested was that the Appellant's functions be

divided between the Appellant as executive officer (or CEO) and a chief operating officer (or COO), who would directly control the operations of the company. He had in mind the appointment of Gregor to the latter position. Bateman discussed these plans with the Appellant, but before they could be brought to finality, Appellant forestalled him by appointing Dudley Smith a managing director of CA. Bateman's reaction to this appointment was one of amazement. He had been aware that Dudley Smith (who had previously been employed in Batepro) was seeking another position in the organisation and had suggested to the Appellant that it might be possible to accommodate him in CA. He had, however, expressly warned the Appellant against appointing him as COO, because of his total lack of experience in the IT business. He accordingly regarded the appointment of Dudley Smith as head of CA to be wholly inappropriate.

[83] Because of the Appellant's denial that there was any genuine dissatisfaction with his performance or any intimation to him of such dissatisfaction until the confrontation between him and Bateman on 19 June 1996, it will be necessary to traverse in some detail the events leading up to that occasion.

[84] The Appellant's failure to maintain satisfactory working relationships with the original managers of Workgroup and CA was noticed by Bateman, who suggested to Appellant that he refrain from dealing with them as adversaries, which was no way to deal with somebody who was a partner of theirs. This criticism was also recorded in a confidential memo from Bateman to the Appellant on 30 August 1994 which was a direct result of Buys having complained to Bateman about the way the Appellant had treated him.

[85] During 1995 it was recorded that at a Batecor directors' meeting held on 6 July Bateman stressed the importance of reducing the risks in the computer companies, which would clearly have implied that Appellant should exercise tighter control over them. This was expressly stated by Bateman at a CA board meeting held on 1 August 1995 when he said that they must make sure that they do not let CAC/CAN (a reference to CA Cape and CA Natal) "just run, and must stay on top of the management of these companies". This was once again a clear indication to the Appellant that he should keep abreast of what was happening in those companies and exercise the proper financial controls.

[86] The incident when Bateman mooted the possibility of appointing Gregor as COO of CA was also relied upon by the Respondents as constituting a clear message to the Appellant that his performance as an executive was lacking in the requisite "hands-on" control to such an extent that Bateman deemed it necessary for someone else to take over those functions from him. This was clearly appreciated by the Appellant, who asked Bateman whether the moving of Gregor up to COO was threatening his position, to which Bateman answered in the negative. The Appellant sought to rely upon this answer as a indication that there was no dissatisfaction with his performance, but Bateman testified that he had chosen to take the Appellant's question literally and answer in the negative because he did not at that stage contemplate terminating the Appellant's employment as CEO even if Gregor were to be appointed at COO.

[87] A further indication that the Appellant was well aware at this stage that his performance was being viewed as unsatisfactory was that

he told Bateman that if Bateman could find someone who could run Batecor better than the Appellant, he should do so as this would be in the Appellant's interests as well. The latter part of this statement related to the fact that the Appellant was at that stage already a substantial shareholder in Batecor and it was accordingly in his interests that it should perform well. Bateman was under the impression that this offer has already been made by the Appellant on a previous occasion, but whether these words were said once or twice is of no moment: the Appellant admitted having said them and they show a clear appreciation on his part that there was dissatisfaction about his performance.

[88] The Appellant also sought to rely upon the fact that in January – February 1996 he was accorded a 10% increase in his emolument which, he claimed, reflected satisfaction with his performance. This, however, proved to be a two-edged sword: for the 10% increase which he received was less than that accorded to other comparable executives in the group and he was informed when it was announced that it would have been more had it not been for CA. This, once again, reflected dissatisfaction with his performance as head of CA.

[89] Appellant further sought to place reliance upon the wording of a cautionary notice issued by the board of Batecor on 20 May 1996 when, as is apparent from what has already been said, it was clear that there was no prospect of Batecor reaching the forecast which had been made at the half year. On the other hand, because of the suppression of Jones's memorandum mentioned earlier, the board was not fully informed as to the

extent of the anticipated shortfall. Nonetheless, even on those figures, the shortfall was sufficient to render it incumbent upon Batecor as a listed company to warn its shareholders of the anticipated deficit. The last two paragraphs of the notice read as follows:

“Corrective action taken at Computer Alliance has resulted in improved performance with the third quarter. The outcome of the Workgroup arbitration will not have a negative effect on Batecor’s earnings for the full year.

The hightech operations, which include Computer Alliance, have been further strengthened by the appointment of Dudley Smith, formerly head of Batepro’s South African activities, who has taken over as executive director.”

- [90] Although the statement was signed by the Appellant, there can be no doubt that it was issued with the knowledge and approval of Bateman, and that it not only paints an unrealistically rosy picture of the situation at CA but also lauds the appointment of Dudley Smith which Bateman claims to have regarded as a disaster. When confronted with this notice in cross-examination, Bateman was forced to concede that it did not accord with his personal view of the situation and sought to justify his approval of it by the necessity for maintaining shareholder confidence in the company. Whilst his preparedness to go along with the contents of this statement smacks of opportunism, I do not think that it is sufficient in itself to cast any real doubt upon his testimony that he regarded the appointment of Dudley Smith as managing director of CA as a grave error.

[91] Finally, the Appellant relied upon the manner in which Batecor dealt with CA after the appointment of Dudley Smith as indicative of the fact that there was no genuine loss of confidence in the way it had been run whilst under the control of the Appellant. The Batecor management considered, but decided against, placing CA in liquidation, and instead resolved to entrust it to Fletcher and Gregor to rehabilitate as far as they could before selling it. This they attempted with little success and it was ultimately sold towards the end of 1966. This to my mind does not negate in any way the Respondents' contention that their loss of confidence in the Appellant was justified. On the contrary, they concluded that the company could not be saved and had to be sold as soon as this was economically feasible.

[92] Bateman testified that the cumulative effect of the Appellant's conduct culminating in the appointment of Dudley Smith was to destroy his confidence in the Appellant's ability properly to discharge his duties as chief executive officer. His attempts to remedy the situation by persuading the Appellant to play a "hands-on" role in CA had failed. Likewise, his attempt to remedy the Appellant's shortcomings by the appointment of Gregor as COO in Batecor was unsuccessful as Gregor was unwilling to accept the position with Appellant. It was becoming apparent to him that he was running out of options and that Appellant would sooner or later have to be replaced. The problem was further complicated, however, by the fact that there did not appear to be anyone immediately available who would be a suitable replacement.

[93] On 1 April 1996, after learning of Dudley Smith's appointment, Bateman consulted with Hall who was, as already stated, a very

experienced and competent company administrator and who sat on the board of ELB as a non-executive director. Bateman disclosed to Hall his loss of confidence in Appellant and the grounds upon which it was based, and sought his advice as what course he should follow to remedy the situation. He told Hall that he was thinking that he was going to have to replace the Appellant and Hall advised him that when that stage was reached his experience was that one tended to delay necessary action; but that when one finally took action after delaying it one wished that one had done it right away.

[94] Bateman testified that he was unable to act immediately on this advice because he had not that time identified anyone as a suitable replacement for the Appellant. He explained that he had for that reason been avoiding a direct confrontation with the Appellant. During the course of June 1996, however, and some time after Bateman had spoken to Hall about the problem, Bateman's son-in-law, Fletcher, who had been employed as the chief executive of a listed company called Rhoex Limited, resigned from his post and sold his shareholding in that company. Bateman immediately identified him as a suitable, possible replacement for the Appellant. What he contemplated was the replacement of the Appellant with Fletcher as chief executive officer and Gregor as chief operating officer reporting to Fletcher: an arrangement which Gregor had previously rejected because he was not prepared to work with the Appellant.

[95] Bateman discussed this possibility with Gregor who reacted favourably to the suggestion, and also with Hall, whose response was more guarded. Hall refrained from directly

advising Bateman as to whether or not he should take the contemplated step, but did advise him to proceed with caution, since the Appellant, being litigious by nature, might resist his plans and the fact that Fletcher was his son-in-law might provide a basis for the accusation that his actions had been motivated by nepotism. Hall discussed with Bateman in considerable detail the possible courses open to him and the implications and likely consequences of each.

[96] Bateman also mooted with Fletcher the possibility of his coming into the ELB Group and assisting in sorting out the problems at Batecor. Fletcher received the proposal favourably, but indicated that he would prefer his activities to extend to Batepro as well as Batecor, and also made it clear that he would only join the group if the Appellant was replaced.

[97] After fully considering the position, Bateman decided that the best solution to the problem would be to attempt to negotiate an amicable agreement with the Appellant whereby he would leave the employ of the group on mutually acceptable terms. The Appellant was at the time away on a overseas trip, but Bateman set up a meeting to discuss the matter with him on his return. That meeting took place on 19 June 1996.

[98] Bateman's version of what transpired at the meeting (which was accepted by the Court **a quo**) was as follows. He told the Appellant that he had wanted to see him because he wanted to take up the Appellant's offer to have somebody else do his job and wanted to bring in Anthony Fletcher. The Appellant did not express any disagreement with this proposal but immediately asked "What about my shares?", which

Bateman understood to be a reference to his unreleased shares in the share scheme. Bateman responded "Well, this is a no fault", by which he intended to convey that the Appellant was not being charged with any misconduct, and continued "I think you get them, but we had better look at the trust deed". Bateman fetched the copy of the trust deed and after they had perused it, said : "No, you do not get them, the trustees have the right to buy them from you at any price up to market price. I do not think that there will be a problem with that." Bateman testified that he was of the view that he would be able to persuade the trustees to exercise their discretion in favour of buying the shares at the market price, and that is why he said what he did.

[99] Appellant's response was to the effect that he thought that the current market price of the shares was on the low side anyway and that he would much rather keep the shares. Bateman responded that he would have to consult with the trustees about that. He was aware when he said this that the trust deed did not permit it.

[100] They then discussed the period of notice which the Appellant would receive and Bateman mentioned that a period of three months was normal for a person in his position. There was some discussion about allowing the Appellant an extended period of notice long enough to enable him to become entitled to the tranche of shares due to be released to him in January of 1997, but nothing conclusive was decided. They also discussed his entitlement under the provident fund and his position under the medical aid scheme.

[101] Bateman was adamant that the only thing which on which consensus had been reached at this meeting was the understanding that the Appellant's departure from the Bateman group was to be an amicable one.

[102] The version put forward by the Appellant when he came to testify was that he and Bateman had concluded a bilateral agreement of settlement on 19 June 1996 in terms of which his employment was to be terminated in return for a certain agreed benefits, including of the release to the Appellant of all shares as yet unreleased to him under the share scheme, to which he would ultimately have become entitled had he continued in the employ of the Respondents.

[103] It will be appreciated that this claim bore no resemblance whatsoever to the Appellant's main cause of action as formulated in his statement of claim, which was that his employment was unfairly and unilaterally terminated by Bateman on 19 June 1996. There is no way in which a unilateral and unfair termination of his employment can be reconciled with the consensual termination to which he subsequently testified: although the Appellant did make some attempt to do so, as will appear hereafter.

[104] On the following day, 20 June 1996, the Appellant's departure was announced to a informal meeting of excom and a notice drafted and signed by Bateman but settled by the Appellant was distributed. It read as follows:

"ANNOUNCEMENT

Edward L Bateman Limited announces the the appointment of Anthony Fletcher as Executor Chairman of Batecor. Also Errol Gregor, currently a director, has been appointed Managing Director.

Peter Brereton, the previous Executive Chairman, will maintain a substantial interest in Batecor, and will remain a non-executive director for a period. He will be devoting his time to other interests.”

[105] A weekend then intervened, but on Monday 24 June Bateman spoke to Hooper, one of the trustees, about the position of Appellant’s unreleased shares. Hooper reverted to him and informed him that there was definitely no discretion in the trustees to allow anybody to retain shares which had not been released to him at the time when his employment was terminated. He further said that he personally was really unhappy with the idea of buying all the Appellant’s unreleased shares at market prices because it would establish an undesirable precedent. Bateman then asked the Appellant to come and see him in order to convey the position to him.

[106] When Appellant entered his office, Bateman told him that he was having trouble with the trustees. Appellant showed no concern at these tidings, but merely smiled and said “Do not worry, I am writing you a letter”. Bateman then said to him that the position was not terminal, for he still hoped that he could prevail upon the trustees to buy back the shares at market prices – although in fact the other trustees subsequently confirmed Hooper’s view that they should not exercise their discretion to do so. Appellant, however maintained his

attitude of unconcern and responded “Never mind, just wait until you get my letter.” He then got up and left.

[107] Later that day Bateman received a memorandum from the Appellant dated the same day. In it he expressed shock at Bateman’s actions on the 19th and claimed that he had had no intimation or warning prior to that day that the company was dissatisfied with his performance. He claimed that he never offered to be replaced as executive chairman but merely to have a COO appointed to assist him. He continued :

“Your offer to pay me out at JSE market price for the unreleased Batecor shares has obviously made me compliant with your wishes to date; which offer I may yet take up”

He went on, however, to deny that any valid grounds existed for the termination of his employment, and, while protesting that he had no wish not to settle the matter amicably, insisted upon his immediate public reinstatement.

[108] The contents of this memo, and, in particular, the allegation that Bateman had made the Appellant an offer which he might yet accept, were clearly inconsistent with Appellant’s testimony in the Court **a quo** that a firm agreement had been reached between him and Bateman on 19 June and bore out Bateman’s version that all that had been agreed was that the parties would endeavour to achieve an amicable separation on terms yet to be settled.

[109] When testifying, the Appellant sought to overcome this contradiction in his evidence by claiming that the memo had been written in reaction to Bateman informing him that the trustees were not prepared to purchase his unreleased shares at the current market price, which he regarded as a repudiation by Bateman of the firm agreement which he alleged had been concluded on 19 June. He testified that he had written a letter to Bateman over the weekend (which was never produced in evidence) but when Bateman informed him of the attitude of the trustees on the Monday morning, he wrote another letter in response to that information, which was the memo produced in evidence.

[110] The Court **a quo**, in my view correctly, rejected this evidence as false. Not only did Appellant not react in any way to Bateman's statement that the trustees were not prepared to repurchase the shares at market value, other than to say that he was writing Bateman a letter (which implied that it was in process of preparation and was not going to be written in future in response to what Bateman told him), there is also no reference whatsoever in the memo itself to what Bateman had told him that morning. The inference is irresistible that Appellant had had second thoughts about his agreement amicably to leave the group and that he seized upon Bateman's statement as an excuse to regard himself at large to refuse to resign unless the much more onerous demands which he made thereafter were met.

[111] Bateman responded to the Appellant's memo of 24 June by way of a letter dated 26 June. In it he pointed out that the

Appellant's memo amounted to a repudiation of the agreement reached on the 19 June to negotiate an amicable separation with a suitable severance package. He pointed out that he had attempted to reach an amicable settlement as an alternative to an inquiry into the Appellant's poor managerial performance, with all the unpleasantness, acrimony and trauma attendant upon such a procedure. He further alleged that the current state of Batecor certainly warranted the institution of such proceedings against the Appellant who, as executive chairman of Batecor, was entrusted with the entire management of its operations. He observed Batecor's poor performance and unacceptable financial results were in themselves evidence of lack of managerial performance on the part of the Appellant and pointed out that his responsibility and culpability in this regard had been brought to his attention as recently as the ELB board meeting held on the March 7, 1996.

Despite the attitude of the trustees, Bateman expressed the view that if the spirit of goodwill prevailed it should still be possible to negotiate an appropriate settlement which should satisfy the Appellant's reasonable expectations, and inquired whether he was to regard Appellant's memo as a termination of negotiations, in which case it was the intention of the company forthwith to commence an inquiry into the Appellant's poor performance.

[112] Finally, as regards the Appellant's demand for reinstatement, Bateman pointed out that Appellant's employment had not been terminated as yet.

[113] The Appellant replied to this letter by letter dated 28 June 1996 stating that he was still prepared to settle the matter amicably but categorically denying that any cause existed for the termination of his employment and disputing all allegations of poor performance on his part.

[114] There followed a meeting between the parties on 2 July 1996 in which the Appellant tabled a document setting forth his demands for a settlement. They commenced with requiring a series of admissions on the part of the Respondents entirely exonerating the Appellant from all blame. Further demands included **inter alia** that Batecor keep Appellant on the payroll on full benefits until the end of June 2003, despite the fact that he was to remain a free agent in every sense throughout that period. There was also provision for escalation of those benefits over the period.

[115] Secondly, he demanded that he be guaranteed his rights to the unreleased Batecor shares.

[116] Thirdly, he required an undertaking by ELB (underwritten by the Bateman family personally) to purchase part or all of the Batecor shares held by the Appellant's family for cash at prices calculated in accordance with the "strike price" at which Gregor would have qualified to exercise an option to purchase shares at that time. This reference to a "strike price" requires some explanation. It is derived from a form of share incentive scheme which Gregor requested be included in his conditions of employment. Instead of granting the employee an option to buy shares over the ensuing period at a price established at the outset, this scheme afforded the employee the option to buy

certain numbers of shares at certain future dates at prices calculated in accordance with a fixed formula which was based on anticipated growth and took into account the inflation rate. Since such options would not be worth exercising unless the market price of the shares exceeded the strike price at the time, this scheme provided an incentive to promote growth in the company. Because of the adverse effects which the poor results of the hitech division had had and were continuing to have on the price of Batecor shares, the Appellant sought to introduce this criterion (for which there was no warrant) in place of the market price.

[117] In order to appreciate the full enormity of these demands, it is necessary to place them in their proper perspective financially. Bateman testified that, although it was not possible to place an exact value on the demands because this depended on a number of imponderables, they represented a figure of between R30 and R33 million. When this figure is viewed in the light of the fact that Batecor's entire net income before taxation for the year ended June 1995 was in the region of R21 million and the total value of ELB's shareholding in Batecor was in the region of R40 million, then the truly exorbitant nature of these demands becomes apparent. Needless to say, Bateman was not prepared to accede to them.

[118] Although it seemed clear that there was little prospect of a amicable settlement, and that the Appellant's employment could only be terminated by following the proper legal procedure, a period of further negotiation ensued, which was categorised by unbridled accusations and threats on the part of the Appellant in the form, not only of letters written by himself and his legal

representatives but also statements circulated to members of the board and press releases. It is unnecessary for purposes of this judgment to deal in any detail with these exchanges which are fully set forth in the judgment of the Court **a quo**. When taxed with this behavior on his part, he sought to explain it as “improving his bargaining position”. In reality, it is quite clear that he could have entertained no genuine hope of his demands being voluntarily met, and that he was concerned primarily with attempting to fortify by his position in the litigation which he anticipated would ensue, by missing no opportunity to show that he had been unfairly treated.

[119] It is also clear that this conduct of the Appellant over the period in question so exacerbated the relationship between him and his colleagues that there was no prospect of their ever being able to work together in amity in the future.

[120] As a result of the meeting on the 2nd July and in pursuance of Bateman's conviction that there was little or no room for an amicable settlement, a meeting of the ELB board was convened for the 4th July at which the appointment of Fletcher as director and deputy chairman of the board was confirmed; Gregor was appointed managing director of Batecor; and Fletcher was appointed as acting chairman of Batecor. In addition, the following took place:

“The chairman reported that discussions had been held with Mr H P N Brereton regarding his future position in the company with the objective of achieving an amicable settlement in separation. It did appear that this had been achieved but subsequently Mr Brereton has made certain

demands which negated a possible early settlement. The company is now required to follow the procedures of the Labour Relations Act and to hold an inquiry and to give Mr Brereton a full opportunity to answer any allegations against him. The inquiry will be conducted by a committee of non-executive directors drawn from Dr L Alberts, Mr J C Hall and Mr R G H Smith. In the interim the services of Mr Brereton will be suspended and no discussion on this matter will take place at this meeting.”

[121] On 4 July 1996 Bateman also published a further announcement in the following terms.

“ANNOUNCEMENT

RE: MR PETER BRERETON

The previous announcement issued on 29 June 1996 was made on the basis that the Company had, at that date, reached an amicable agreement with Peter Brereton regarding his position in the company. Subsequent events indicate that this was not the case.

The purpose of this notice is to replace the announcement made on 20 June 1996 with the following:

Edward L Bateman announces the proposal of the promotion of Errol Gregor to Chief Executive of Batecor, subject to Batecor board approval.

It also announces the appointment of Anthony Fletcher to the board of ELB Limited, as Deputy Chairman. As a consequence

thereof he has been appointed a director of Batepro, and will be proposed as a director of Batecor.

Peter Brereton's services have not been terminated. Discussions are taking place with him regarding his position. A further announcement will be made in due course".

[122] Despite the foregoing, the Respondents through their attorneys made an offer of settlement to the Appellant on 9th July 1996 in terms thereof he would continue in their employ at his full emolument, without being required to discharge any duties, for a further period of six months and would also receive the next tranche of shares which was due to be released in January 1997. This offer, which was worth approximately R3 million, was rejected. The Respondents accordingly proceeded to hold the proposed inquiry.

[123] Before dealing with the inquiry itself and the question of whether it complied with the requirements of procedural fairness, I should advert briefly to the Appellant's contention that Bateman's intimation to him on 19 June that his performance was regarded as unsatisfactory, came as a complete surprise, and that he had no inkling or warning of any dissatisfaction about his performance prior to that date. A survey of the evidence, however, reveals that there were a number of warnings directed to him or known to him as to the unsatisfactory state of affairs in CA and as to the necessity for him, as the person responsible for the administration of that company, to remedy the position. As far back as 27th September 1993, Vey addressed a memorandum to the Appellant expressing concern about the excessively high increase in overheads and advising

him that it would be necessary for them as a priority to address the management and ensure that they have the business under control.

[124] On 6th September 1994 Fletcher at a board meeting of BIH, gave an emphatic warning regarding inadequate controls in place in CA.

[125] On 6th January 1995 Bruce Young, the legal adviser to BIH, addressed a memorandum to the Appellant in which he stated “I am troubled by the deep-seated fear that we maybe unable to run Computer Alliance profitably”.

[126] On 6th July 1995 Bateman at a Batecor board meeting, stressed importance of reducing the risks in the computer companies.

[127] During August 1995, the financial director of CA, Craig Smith, addressed a memorandum to Passmore which was forwarded to the Appellant stating “The CA group is sitting with too much invested in stock and debtors, which is funded by creditors which are overdue for payment.”

[128] In the same month Passmore himself submitted a memorandum to Brereton in which he highlighted the build-up of stock and debtors in the Cape in CA (amongst other things). Although the latter two memoranda were handled by Vey because the Appellant was overseas at the time he discussed them with the Appellant. Strangely, however, neither memorandum reached the financial directors.

[129] At a CA board meeting held on 27th June 1995, Bateman warned about the lax management of CA Cape and CA Natal; questioned the escalation of overheads in those two concerns and also questioned the escalation of stock levels in the Cape.

[130] On 3 July 1995 Bateman addressed a memorandum to the Appellant and Herselman drawing attention to faults in both Batecor and Batepro in which he pointed out, **inter alia**, that in Batecor there were known weaknesses in finance and insufficient depth of strength in general management. He added that the thoroughness and accuracy of financial controls might also be suspect and advised Appellant and Herselman to make sure that they had excellent people in those areas, as they had not given enough attention to getting more top-notch people and had tolerated under-performers for too long.

[131] On various occasions in 1995 Bateman repeated to the Appellant that CA was his responsibility; and towards the end of that year he told the Appellant that he would have to get personally involved in the problems of CA in an attempt to sort them out. He advised the Appellant to spend a lot of time on CA; in fact, as he put it, "to live there". Appellant's reaction was, however, that he was not prepared to do so because the rest of the business would suffer.

[132] Perhaps the most striking expression of concern over the state of affairs at CA was made by Hall at a board meeting of ELB held on 7 March 1996, to which Bateman specifically referred in his letter of 26th June 1996 in answer to the Appellant's complaint that he had received no warning. It appears from

the extract from the transcription of the meeting which was included in the evidence that the board was discussing the adverse consequences of CA moving away from the networking side of the business. Dealing with the fact that CA had stock worth R60 million when the Appellant thought he had R30 million, Hall is recorded as saying

“I mean if it was my business somebody would be falling on his sword and the blood would be running in the gutters in it. Maybe you should – you’re the boss.”

[133] Hall, when questioned about this statement in evidence, stressed that although what he said might perhaps been seen by some of the members of the board as being somewhat humorous, he meant this comment seriously because the situation was seen by him to be very serious. He was also under the impression that this had been appreciated by the other members of the board.

[134] Apart from these instances in which the shortcomings of the Appellant’s performance and the necessity for him to take remedial measures were expressly brought to his attention, I am of the view that he must in any event have been aware of those shortcomings by virtue of the disastrous performance of the business of CA and the failure of such measures as he had put in place to remedy the situation. These were matters of which he was fully aware at all relevant times. As an experienced executive and a highly intelligent man, he could not have failed to appreciate that his performance was inadequate and that that inadequacy was occasioning grave concern to his colleagues and employers.

[135] A further unmistakable indication of the unfavorable light in which his performance was viewed was given to the Appellant shortly before June 19 when he approached Bateman to inquire whether or not ELB would underwrite a rights issue for Batecor to alleviate the dire financial straits in which Batecor found itself as a result of its involvement in CA. Bateman testified that he had no hesitation in refusing to recommend such a step and expressed in view that he would have thought this refusal was as clear a signal of lack of confidence as one could send.

[136] I revert now to the hearing of the inquiry which took place before what was referred to as "the Smith Committee". The committee consisted of Messrs Smith, Hall and Hooper (the last-mentioned having been appointed in the place of Dr Alberts, who unavailable).

[137] The Appellant was apprised of the board's decision to proceed with the inquiry by a letter dated 11 July 1996. This was followed by a more detailed notice on 22 July 1996, which called upon the Appellant to attend a hearing on 30 July 1996 into the poor performance of Batecor and his role therein. It apprised him of the time and place of the hearing and then notified him in detail of the issues to be considered. They were described as follows.

- "1. The adequacy of your managerial ability and competency in the planning, direction and control of Batecor and, in particular, relating to Batecor's entry into the information technology industry. Specific reference will be made to the

management and performance of the Hitech division. In respect of the foregoing, the following issues and allegations will be considered –

- 1.1 Batecor has a disproportionately high investment in the Hitech Division in relation to its shareholder funds. Computer Alliance (“CA”) alone has ingested cash and guarantees in excess of Sixty Million Rand;
- 2.3 2.3 The appointment of unsuitable and/or inexperienced persons to executive positions particularly within the Hitech division;
- 2.4 2.4 Your ability to maintain effective working relationships with people appointed to run the business within Batecor and particularly the Hitech division;
- 2.5 2.5 The control of executives reporting to you in Batecor and particularly in the Hitech division;
- 2.6 2.6 The control of overhead expenditure at CA;
- 2.7 2.7 The absence of a adequate stock valuation system and accounting policy to take cognizance of obsolescence in hi-tech stock during the financial year ended June 1996 and prior years.”

[138] The next paragraph dealt with Workgroup Systems and the allegations contained therein were subsequently withdrawn from consideration by the inquiry.

[139] The next issue raised in the letter was the following:

“Your competency to grasp problematic issues and take effective corrective action. It will be alleged that you displayed an inability to recognize, assess and take effective corrective action in regard to the problems within Batecor and particularly within the Hitech division. In this regard reference will be made **inter alia**, to –

2 2 The 1994/1995 and 1995/1996 budgets you presented before Batecor with particular reference to Hitech division and Metquip;” (The issues relating to Metquip were subsequently withdrawn from consideration by the Committee).

“2. The inaccurate and unrealistic forecasts from time of listing and resultant need to issue two cautionary warnings to Batecor’s shareholders and one cautionary warning to ELB’s shareholders.”

[140] The following issue was:

“The nature of the relationship between Batecor, its investors and bankers. It will be alleged that you, in your capacity as executive chairman of Batecor, have lost credibility with Batecor’s bankers and investors to the detriment of Batecor and the Bateman group.”

[141] The next issued raised was:

“The nature of your relationship with your superiors, colleagues and subordinates. It will be alleged that you have failed -

1. to engender the confidence of your superiors, colleagues and subordinates;
2. to display adequate and appropriate leadership by giving proper direction, guidance and support to your subordinates.”

[142] Finally it was stated the inquiry would also relate to:

“The anticipated financial results of Batecor (based on the trading results to end May 1996) for the year ended 30 June 1996, Batecor’s current financial position and how this poor performance has been building up over a number of years.”

[143] As regards the procedure, it was stated in the letter that the inquiry would not be a formal disciplinary hearing but rather take the form of a consultative process. It informed the Appellant that both he and the so-called “initiator” would have the right to present evidence and make submissions on the issues mentioned. It also informed the Appellant that he would be entitled to the assistance of a colleague and advised him to contact Mr. Young who would assist him in arranging for such representation and also in obtaining such

information as might be reasonably necessary for the preparation of his submissions.

[144] The letter further apprised the Appellant of the composition of the sub-committee of the ELB board which would conduct the inquiry and explained that after hearing the evidence it would be asked to make a recommendation to the ELB board on the appropriate course of action to be taken. A full board meeting would then consider those recommendations.

[145] Finally the letter warned the Appellant that the issues to be considered by the committee went to the root of his employment relationship with the Bateman group.

[146] In a written response to this notification the Appellant objected **inter alia** to the composition of the committee.

[147] All three of the members were directors, who were fully aware of the state of affairs in CA and Batecor. Indeed, it would have been wellnigh impossible to put together a committee whose members did not have such knowledge unless complete outsiders were brought in to conduct the inquiry which would have been wholly impractical. However, this was not the basis of the Appellant's objection, although he did suggest that the committee should be composed of directors from the board of Batecor rather directors from ELB. The gravamen of his complaint was that all three of the members had served on the audit committee and had therefore been directly involved in many of the issues which would have to be considered by the committee.

[148] The Appellant also objected to Bateman acting as “initiator”, on the basis that the members of the committee, being subservient to him, would be likely to uphold his position. He also complained that he might wish himself to call Bateman as a witness.

[149] Finally, the Appellant included in his letter a 19-page request for documents and admissions ranging over a vast field of company activities and covering a considerable period. This was the first manifestation of the strategy to be employed by the Appellant throughout the inquiry and, indeed, during the subsequent trial, of attempting to broaden the issues to such an extent as to make the whole process so unwieldy as to be virtually unworkable. This strategy involved, **inter alia**, requiring full information and documentation of all the Appellant’s activities in the Batecor group since he joined it, ostensibly to show that his performance had been satisfactory in all respects apart from CA. Since there were no allegations of inadequate performance on his part in any other field except CA and Batecor as far as it was effected thereby (save for the subsequently abandoned allegations regarding Workgroup and Metquip), this material was not relevant to the inquiry.

[150] The second major respect in which the Appellant sought to extend the scope of the inquiry was by requiring, under the guise of demanding consistency, full details of all disciplinary proceedings against other employees of the group who were alleged to have exhibited inadequacy in the performance of their duties. Since each case depends on its own facts, this type of comparison inevitably results in a multiplicity of inquiries into the correctness of what

happened in the other cases sought to be relied upon. Furthermore, because there are inevitably material differences in the facts of each case, no real assistance can be derived from such an investigation.

[151] Bateman responded to this letter, pointing out that it was the prerogative of the employer to decide upon the procedure to be followed at the inquiry and the composition of the body conducting it, and indicated that he was not prepared to make any changes in the identity of the members of the committee. He invited the Appellant to make such objections as he desired on the procedural aspects of the inquiry at the commencement of the hearing.

[152] As regards the Appellant's request for documentation, he once again invited Appellant to contact Young, who would assist him in obtaining the information necessary for his case. Any requests for further discovery or postponement would be considered at the hearing.

[153] The Appellant's response was merely to reserve his rights.

[154] The hearing before the committee commenced on 30 July 1996. At the outset of proceedings Smith explained the procedure and stated that if the Appellant needed further time to collect the documents he required and prepare his case the committee would afford him the opportunity to do so.

[155] With reference to the Appellant's suggestion that the members of the committee would not be impartial, Smith placed on record that both he and Hall were non-executive directors and, as such,

independent. He asked Hooper whether he, as an executive director, felt compromised in any way and Hooper claimed to be able bring an independent mind to bear on the issues despite his close association with the events in question.

[156] The Appellant did not thereafter pursue his objection to the composition of the board by the way for a application for recusal or further objection.

[157] I find it unnecessary to set forth in detail what transpired at the inquiry. In essence, Bateman as initiator presented a case in support of the complaints set forth earlier in this judgment and the Appellant met them with the defences which I will discuss hereafter. There are, however, certain aspects of the procedure at the inquiry which have a bearing on the criticisms raised by Appellant, to which I will have to refer specifically.

[158] Perhaps the main aspect which merits mention is the attitude and utterances of the members of the committee on which the Appellant sought to rely as an indicative of bias on their part. In order to see these utterances in their proper prospective, it is necessary to take into account the situation which faced the members of the committee when the hearing took place. As directors of ELB, they were all, to a greater or lesser extent, acquainted with the events which were the subject of the inquiry. They also had experience of the personalities and behaviour of the persons involved. In particular, they were aware that as a result of Bateman's alleged loss of confidence in the Appellant, and the Appellant's reaction thereto, there had been an almost complete breakdown of the

personal relationship between them, irrespective of where the fault lay. Although the powers of the committee theoretically included the recommendation that the Appellant be reinstated, it must have been apparent to any reasonable person at that stage that it was practically impossible that a proper working relationship could ever be restored between Bateman and the Appellant. The crucial issue which the committee had to determine was whether there existed proper grounds for the termination of the Appellant's employment in that Bateman's alleged loss of confidence in the Appellant was, firstly, genuine and secondly, based on reasonable grounds. If the committee made a finding to that effect, it would be justified in recommending to the board that the Appellant's employment be terminated. If, on the other hand, it found that no justification existed for the termination of his employment, it would have to recommend to the board that it resolve the impasse by other means, which would in all probability involve what the Appellant termed "buying the job from him", i.e. offering him whatever it would take to persuade him to leave the employ of the group voluntarily.

[159] The point to be borne in mind in assessing the remarks by committee members that follow, therefore, is that an appreciation by them that a separation between the Appellant and the ELB group was virtually inevitable, did not preclude them from bringing an objective judgment to bear on whether good and genuine grounds existed for the unilateral termination of his employment by his employers.

[160] The two passages primarily relied upon the Appellant in this regard occurred towards the end of the first day's hearing when Hall saw fit to resort to the use of a striking but revolting image borrowed from America, namely, "the turd on the breakfast table". It happened thus. The committee had been debating the period for which it should adjourn in order to enable the Appellant to obtain the additional information which he claimed was necessary for the presentation of his case, and Hall was asking, basically, where this was going to get them. He is recorded as saying the following.

"The pillars of your case are going to be the ones that we discussed here. And then we have got to say, and we are then placed in a very difficult situation if we are asked to say well was there precedent in somebody else's mistakes not being treated as harshly. We get into an area where I would imagine we would be rapidly out of our depth, chairman. And this whole question of relevance comes into the whole thing. I have – you know we are going through all this whole exercise and if you came up with the most beautifully articulated case, which says x,y and z, I don't think it helps us out of the problem and I think that is what Bill is saying. We are going to go through this agony and at the end of it, whatever we as a committee recommend to the board, we still are faced with the turd on the table that has to be removed. Is this a reasonable summing up?"

[161] To this the Appellant respondent "absolutely".

[162] Hall then continued:

“So do we tackle the turd, or go through. The turd is not going to go away in my view, even if you present your case quite well.”

[163] Thereafter, in clarifying to Bateman what he had said, he explained that the turd on the table was the fact that Bateman had lost confidence in the Appellant and that he did not think whatever the Appellant put forward was going to change Bateman’s view.

[164] The second passage which occurred shortly thereafter, comprised the following remarks by Smith.

“I think, as we said up front, this committee could come to a number of conclusions. It could come to the conclusion that he in reality was wrongfully dismissed and should be reinstated. It could come to the conclusion that he has done no wrong, or that he has done wrong. It could come to a conclusion of a number of things. But, as said, if it came to the conclusion that in fact that he should be effectively reinstated, from the company’s point of view, we could not do that because he hasn’t your confidence and he hasn’t the confidence of a number of other senior executives. So, practically speaking, it is impossible to reinstate him. So we would have to say, even if we found everything was absolutely squeaky clean, we would have to say that we recommend in the interest of the company Batecor and Bateman Edward L that the directors terminate his services for the reason principally that the executive chairman and the senior executives in Batecor have lost

confidence in him. And for this reason it would not be in the best interest of the company.”

[165] Shortly thereafter the hearing was adjourned to 13th August 1996.

[166] It is significant that not only did the Appellant (and his representative in the proceedings, Mr Speedie) agree with what Hall had said but, when it was suggested that there be an attempt to reach a mediated settlement during the adjournment, the Appellant suggested that Hall act as mediator – which cannot be reconciled with his subsequent allegation that Hall was biased against him.

[167] During the adjournment the committee sent a memorandum to Bateman and the Appellant proposing certain steps to narrow the issues and stressed the need for the matter to be completed expeditiously. The Appellant, however, raised a number of objections to the suggested procedure and insisted that all the issues he wished to have raised be fully investigated and that he be afforded sufficient time to prepare himself on all those issues. He also referred to the remarks which I have quoted, which he alleged showed that the committee had prejudged the issues and requested that they withdraw the remarks and proceed with the inquiry without any preconceived views.

[168] In response, the committee informed the Appellant that his objections would be considered at the outset of the hearing on the 13th August and that he should prepare himself to proceed with the inquiry on that date.

[169] There was also correspondence between the Appellant and Mr Young in the interim with the Appellant claiming that he was not receiving all the documentation he required and Young insisting that he was doing all within his power to assist the Appellant.

[170] On 13th August, after some debate about the correctness of the transcript of the previous proceedings, Smith referred to the objections raised by Appellant in his letter and in particular to his accusation that the committee had prejudged the position. He tried to explain to the Appellant that the real issue before the committee was the role of the Appellant in the position in which CA and Batecor found themselves and that the committee had no preconceived ideas on that issue. He pleaded with the Appellant to curtail the proceedings by dealing with that issue and undertook that the committee would give what he said frank and dispassionate consideration. Appellant, however, disregarded this plea and proceeded to present his case on every issue that he had raised.

[171] These issues included the allegation that Bateman had built up a false case against him. In this regard the Appellant said the following:

“I state quite clearly his (Bateman’s) is a fabricated case put together with rigged figures after the event to try to justify a decision already made and implemented on 19 June without reference to the Batecor or ELB boards and will not stand up under cross-examination.”

[172] Finally, after he had addressed the board fully for a number of hours on all aspects of his case, he was requested to sum

up his contentions, which he did under protest and accused the committee of “ramrodding a decision through”. Smith’s response was to deny that the committee had come to any decision as yet but to point out that it was in the interests of all concerned that it come to decision and make whatever recommendation it deemed fit as soon as possible.

[173] Before the conclusion of proceedings Bateman handed in a letter signed by Gregor, Graham Jones, Spirou and Vey which read as follows.

“I confirm having informed you that the Batecor Excom has lost all confidence in Peter Brereton’s ability as executive chairman of Batecor, based both on the company’s and his past performance and on what has become evident from a closer look into affairs of the Batecor group. Should Peter Brereton return to Batecor, then under no circumstances whatsoever would any member of the Batecor Excom remain a part of the management team.”

[174] On 15 August 1996 the Smith committee submitted its report to the board of ELB. It is a lengthy document in which the committee found that the allegations made in the notice commencing the inquiry had been substantially established and that the Appellant had not vindicated himself or distanced himself from responsibility for the poor performance of Batecor and its precarious financial position. It concluded that the Appellant recognized that CA was causing Batecor to haemorrhage but was ineffectual in initiating or taking any action to stop the bleeding. It found that as a result Bateman and the Appellant’s other executive

colleagues were fully justified in their loss of confidence in the Appellant, particularly in view of the magnitude of the investment and losses incurred in CA. Their main findings and recommendations to the board were formulated as follows.

“1. Mr Bill Bateman as the chairman of ELB, the holding company of Batecor, is justified in his loss of confidence in Brereton’s managerial ability and competency and in his capacity to continue in the role of executive chairman of Batecor, and more particularly in Brereton’s ability and competency to turn the situation at CA around;

2. The sub-committee accepts the statements of the Excom as contained in their letter of 13 August 1996 to the effect that they have lost confidence in Brereton’s ability to continue in the role as executive chairman of Batecor;

3 3 3. The employment relationship between Brereton and Bill Bateman

and between Brereton and his colleagues and subordinates has been irreparably damaged;

4. To reinstate Brereton in his employment and to his position as executive chairman of Batecor would cause immense disruption to the businesses within Batecor. It is the sub-committee’s view that the interests of Batecor and ELB outweigh Brereton’s interests in relation to his job security of future employment with Batecor;

2. 2. The grounds for the termination of the employment of Brereton are not based on misconduct but rather based on the

fact that Brereton has displayed inadequate managerial ability and incompetency in his role as executive chairman of Batecor in particular in relation to taking effective corrective action at CA;

3. 3. Notwithstanding Brereton's submission that he had received no prior warnings in relation to his performance, Brereton in his senior position of executive chairman was fully aware of his duties that are commensurate with his position and moreover he was fully aware of the problems at CA;

7. Given the extent of the breakdown in trust and confidence the sub-committee do not believe that Brereton should be employed in an alternative capacity. The sub-committee are moreover not aware that any such alternative position exists.

Therefore, in conclusion, the sub-committee recommends that:

1. Brereton's employment with the Bateman group be terminated with immediate effect;
2. Such termination be accompanied by; -
 - 2.1 an appropriate payment in lieu of notice in terms of Brereton's contract of employment;
 - 2.2 An appropriate severance package that the ELB board considers fair and reasonable taking into account all the circumstances surrounding his employment with the Bateman group;

2.3 2.3 That such severance package be determined by the ELB board in consultation with Brereton”.

[175] After debating the matter, the board passed the following resolutions with Bateman abstaining and Appellant voting against them.

- “1. That Mr H P N Brereton’s employment with the Bateman group be terminated with a notice period of three months, during which he will be required not to report for work and all executive powers are removed;
2. That Mr H P N Brereton’s directorships be terminated in all Bateman group companies as soon as possible.”

[176] It was further resolved that Hall should be authorized and mandated to consult with the Appellant in a endeavour to determine an appropriate severance package over and above the three months’ notice, in accordance with the sub-committee’s recommendations. This resolution was passed unanimously.

[177] On 26th August the Appellant was formally notified in writing of the termination of his employment with three months’ notice in accordance with the resolution quoted. The board further tendered in this notification an additional payment to him of R617 630 being the equivalent of a further nine months’ remuneration in full and final settlement of all his claims. This tender, which was rejected by the Appellant, is the one

which was repeated in the Respondents' reply to the Appellant's statement of case.

[178] Also in pursuance of the resolution, Hall attempted to reach agreement with the Appellant on a appropriate severance package. The board had given him a mandate to offer the Appellant a payment of up to R4,2 million, but in fact Hall exceeded his mandate by offering the Appellant R5 million: a figure which he based on the value at that time of the Appellant's unreleased shares. The Appellant, however, rejected this offer as well and made no counter-proposal other than to refer to the demands in his letter of 2 July 1996.

[179] The dispute between the parties was referred to the Industrial Council for the Iron, Steel, Engineering and Metallurgical Industry in terms of the then Labour Relations Act, No 28 of 1956. As certain of the Respondents did not fall in the jurisdiction of that Council, a Conciliation Board was established in terms of the Act on 17 October 1996 in respect of those Respondents. Neither the Conciliation Board nor the Industrial Council was able to settle the dispute and the Appellant accordingly requested the Court **a quo** to determine it in terms of section 46 (9) of the Act, which led to the present proceedings.

[180] Before embarking on a investigation of the Appellant's grounds of complaint against his dismissal, I should state categorically that I am satisfied on the evidence (as was the Court **a quo**) that he was not dismissed at all on 19 June 1996. In so far as there was any agreement on that date, it was no more than a agreement in principle that the Appellant would leave the employ of the Respondents amicably, on suitable terms yet

to be negotiated. I am further satisfied (as was the Court **a quo**) that it was the Appellant, and not Bateman, who repudiated that agreement, to maintain the position that he was still in the employ of the Respondents as a bargaining counter in future negotiations. It follows that the investigation relates solely to the termination of the Appellant's employment on 26 August 1996.

[181] Against this factual background, I turn to an examination of the respects in which the Appellant alleges that the termination of his employment was substantively and procedurally unfair. I will deal firstly with the allegations of substantive unfairness and thereafter with those of procedural unfairness.

[182] The first ground for the claim that the termination was substantively unfair is that the loss of confidence upon which it was allegedly based was not **bona fide**, because it was motivated by nepotism and based on rigged figures.

[183] The allegation of nepotism derived **prima facie** support from the fact that it was only after Bateman's son-in-law, Fletcher, became available for the Appellant's position that Bateman expressly informed the Appellant of his loss of confidence and his decision to replace him with Fletcher. Hall, as already mentioned, warned against the use the Appellant might make of this sequence of events, and, indeed, the immediate impression it could create was illustrated by Gregor's comment to Appellant that Fletcher's appointment "had nothing to do with performance but everything to do with family matters".

[184] On the other hand, the long history of dissatisfaction on the part of Bateman at Appellant's performance militates against the conclusion that this claim of loss of confidence was feigned to enable him to replace Appellant with Fletcher. I have already dealt with Appellant's claim that no such dissatisfaction existed and found that it is without justification. What is conclusive of the matter, however, is the fact (correctly accepted by the Court **a quo**) that Bateman confided his loss of confidence in Appellant to Hall before he was aware that Fletcher would become available as a replacement. His desire to replace Appellant with Fletcher could therefore not possibly have motivated his expressed loss of confidence in that stage. The fact that he delayed confronting the Appellant with that loss of confidence until he learned of Fletcher's availability, was satisfactorily explained by Bateman as being due to reluctance to terminate Appellant's employment until he had identified a suitable replacement.

[185] I am accordingly of the view that the attack on Bateman's **bona fides** based on nepotism was correctly rejected by the Court **a quo** and that his loss of confidence was indeed based on Appellant's defective performance.

[186] The next ground of attack was that the alleged loss of confidence was based on artificially rigged figures relating to the performance of CA. As already mentioned, the Appellant ultimately did not persist in this submission, but only after the investigation of the accusation had taken up a large part of the trial before the Court **a quo**. Appellant did persist, however, in his allegation that the figures gave a wrong impression of his performance, and did

not, therefore, provide a basis for a genuine loss of confidence in his ability.

[187] This allegation was fully investigated and, in my view, correctly rejected by the Court **a quo**. I do not propose to deal with the grounds for that rejection in any detail, as they are adequately set out in the judgment of that Court. In essence, the allegation was based the contention that the shortfall in the value of the stock held by CA was due to a change in policy – the so-called “paradigm shift” – which had the effect of artificially depreciating its value. Jones explained in evidence that it was as a result of the excessive built-up in stock in CA that the board decided to implement a back-to-back policy: i.e. that only sufficient stock would be maintained to meet the orders which the company had received. The consequent redundancy of unrequired stock in hand did lead to a loss in value which was exacerbated by obsolescence: but this was not a unrealistic result; on the contrary, it was the consequence of a realistic appraisal of the true financial position of the company, and flowed directly from the excessive build-up stock for which Appellant and his appointees – particularly Passmore – were responsible.

[188] I am accordingly also of the view that the Court **a quo** correctly rejected the contention that Bateman’s alleged loss of confidence was not **bona fide** because it was based on fabricated grounds. It was correctly found to be genuine and based upon grounds which Bateman believed to be valid.

[189] This conclusion brings me to the second leg of the inquiry as to substantive fairness, which is whether the grounds upon which the loss of confidence was based were reasonable, viewed

objectively. It was established beyond question that grounds which **prima facie** constituted an objective basis for the loss of confidence, existed in the form of the unsatisfactory performance of CA whilst under the control of Appellant.

[190] Appellant attempted to shift the blame for this state of affairs onto his subordinates, but found himself on the horns of the dilemma which faces any senior management executive who seeks to rely on upon this justification. Either he did not keep himself informed of the activities of his subordinates and therefore failed properly to supervise their activities; or he was aware of their actions but did nothing about them, and so failed properly to control them. In any event, the ultimate responsibility for their actions rested upon the Appellant who had, in the exercise of his power to hire and fire employees, appointed them to their posts.

[191] Appellant likewise attempted to shift the responsibility for the faulty administration of CA onto his superiors on the board of ELB. It is perfectly correct that members of a board who allow their CEO to continue in office when he is not properly performing his duties, are not themselves free from blame, and that the longer this situation is permitted to go on, the greater is their blameworthiness in not immediately taking appropriate corrective measures. This was not disputed by the board. At the meeting on 16 August 1996, at the report of the Smith committee was considered, Leroy is recorded as having said:

“..... I think the Batecor board and the executive committee have to share in the responsibility for this disaster. I

personally think it's unfair to lay it, all the blame on Peter. I think we all share that responsibility. I mean we are talking of what, R70 million? How can we sit here and say we didn't know?"

Whilst there is some justice in this remark, it mitigates the blameworthiness of the board in the present case that they were not always fully apprised of the position in CA (as occurred when Appellant caused Jones memorandum to be suppressed) or lulled into a false sense of security by Appellant's unjustifiably optimistic forecasts.

[192] In any event, the responsibility of the board is a limited one, and does not detract from the prime responsibility which rests upon the CEO, as was explained in the passages from the evidence of Bateman and Hall set forth earlier in this judgment. It is not necessary in order to justify a loss of confidence in a CEO, that he should be exclusively responsible for the failure of the company under his control to perform properly; it is sufficient if he shares responsibility for it (see **E C Cook v Thomas Linnell & Sons Limited, supra**).

[193] In the premisses, I am satisfied that the Court **a quo** was correct in finding that the termination of the Appellant's employment by the Respondents was substantively fair.

[194] I next turn to the question whether the requirements of procedural fairness were satisfied.

[195] The first ground upon which the Appellant claims that the termination of his employment was procedurally unfair was that he received no warning of the shortcomings in his performance nor was he afforded any opportunity to rectify the position. In the first place, I incline to the view that the facts of this case place it in the category of exceptions recognized in the authorities quoted earlier in this judgment, in which fairness does not require the employee to be expressly warned of his shortcomings. The facts of which the Appellant must have been aware, were more than adequate to bring to his notice that he was not discharging his duties properly, and he is far too experienced and perceptive an executive to have thought otherwise. As already mentioned, he would have been well aware of the shortcomings in his performance, and of the necessity to rectify them, without any warning to that effect, for a substantial period before the decision to dismiss him was taken.

[196] It is, however, unnecessary to base the decision in this case on that ground alone, for the evidence summarized earlier reveals that the Appellant was in fact frequently and timeously warned of the inadequacies of his performance and actually advised as to the steps necessary to remedy them. It follows that he has no cause for complaint on this score.

[197] The major grounds for criticism advanced by the Appellant relate to the inquiry conducted by the Smith Committee. The first point which he raised was that he was not given sufficient access to the relevant documents to enable him properly to prepare his case. It will be recalled that he requested a vast number of documents for that purpose and that he was

referred to the group's legal adviser, Young, who was delegated to assist him in locating them. Young testified that he did so to the best of his ability, and that a large number of the documents requested were located. At the first day of the hearing, however, the Appellant intimated that he had not received all the documents that he required, and he was ultimately granted an adjournment for that purpose. The inquiry had not yet reached the stage where he was required to present his case.

[198] At the resumed hearing the Appellant mentioned that he had still not received all the documentation he had asked for, but nonetheless elected to proceed with his case. He did not appear to be handicapped in any way by the absence of documentation: indeed, most the material he called for related to peripheral or irrelevant issues, such as his performance in other companies and consistency in other cases, and was not used either at the inquiry or at the subsequent trial. I am satisfied that the Court **a quo** was correct in holding that he was not materially prejudiced by his lack of access to such documents as had not been made available to him at that stage.

[199] The chief target of Appellant's attack on the inquiry was, however, the alleged partiality and bias of the members of the committee which, he alleged, had led them to prejudge the issues and reduce the proceedings to a charade. The first salvo in this attack was the objection to the composition of the committee based upon the fact that all three of the members had served on the audit committee and had therefore been involved in many of the issues to be

investigated by the inquiry. This type of objection, as Bateman testified, could have been made against any of the directors, all of whom had knowledge, to a greater or lesser extent, of the issues involved. As I have already pointed out, it would be impractical to regard such knowledge in itself as a disqualification. Moreover, having regard to the limited role of the audit committee, membership of that body could not reasonably be regarded as precluding the nominated members of the committee from impartially deciding the issues before the inquiry, nor do I think that the Appellant had any reasonable grounds for believing that to be the case. In fact, the Appellant elected not to take this objection any further by asking the members of the committee to recuse themselves (although he had the benefit of legal advice) and proceeded to present his case before the committee as originally constituted.

[200] The main thrust of his attack was, however, based upon those passages from the record to which I have already referred, and which, it could be argued, revealed a preconceived approach to certain of the issues on the part of the members of the committee. Counsel for the Appellant sought to supplement them by an ingeniously constructed mosaic of concessions wrung from the members under cross-examination, but he did not, in my view, succeed in establishing anything more sinister than what had already emerged from those passages. That was, as already observed, a realization that where the chairman and executive committee of a company lost confidence in the ability of its CEO adequately to perform his duties, there is no reasonable possibility, whatever the rights and wrongs of the matter, of restoring a normal employment relationship between them. One would have thought that the truth of this proposition

was so self-evident that no right-thinking executive would have disputed it. In fact, as already mentioned, the Appellant and his representative had expressed their agreement with it when it was enunciated by Hall. It could hardly be necessary for a fair hearing that the committee should investigate and consider afresh a matter which all were agreed was a foregone conclusion, and the Appellant could not reasonably have thought otherwise. I do not think that a recognition of this proposition could conceivably have influenced the ability of the committee members impartially to decide the real issues before them, namely, whether Bateman's loss of confidence was genuine and whether it was based on reasonable grounds.

[201] In the premisses, I am of the view that the Court **a quo** was correct in its conclusion that the proceedings at the inquiry were substantially fair and complied with the requirement that even a senior managerial employee is entitled to a proper hearing before his employment can be fairly terminated.

[202] It follows that no grounds exist to interfere with the findings of the Court **a quo** that the termination of the Appellant's employment by the Respondents was both substantively and procedurally fair, and that no unfair labour practice was committed in the course thereof by the Respondents.

[203] It remains to deal with the Appellant's claim for delivery of the unreleased Batecor shares, alternatively for payment of at least R12 million for the shares. The Court **a quo** refused to grant this prayer, and in my view it was fully justified in that

refusal in the light of its findings. The proceedings before that Court were brought in terms of section 46 (9) of the Act, which only empowers the Court to award compensation to an employee which has found to have been the victim of an unfair labour practice. The finding of the Court **a quo** that the Respondents were not guilty of any unfair labour practice accordingly disposed of that claim in so far as constituted a claim for compensation based on wrongful dismissal. In so far as it was based upon the agreement relating to the shares allegedly concluded between the Appellant and Bateman on 19 June 1996, that claim was disposed of by the finding of the Court **a quo** that no such agreement was concluded: a finding which, I am satisfied, was correct, despite the endeavours of Appellant's counsel to persuade us that it was wrong.

[204] In the course of the appeal, Appellant's counsel delivered a set of supplementary heads of argument in which he contended that the Appellant was entitled to delivery of the shares on a totally different basis: namely, that the ownership of the shares vested in him. It had been alleged in his statement of case that his rights to the shares had been ceded to a company called Pebet Holdings (Pty) Limited, a Brereton family company, which then paid for the shares. It was argued on appeal that since Pebet Holdings had subsequently been liquidated and Appellant now controlled its assets, he was entitled to the shares.

[205] The simple answer to this argument is that the rights which Appellant acquired and ceded to Pebet Holdings, although they were ceded under a provision of the trust deed which described

them as “the rights of beneficial ownership”, were and remained subject to the provisions of the trust deed. The Appellant (and any cessionary to whom he ceded such right) was only entitled to delivery of the shares if all the conditions stipulated in the trust deed were fulfilled. Since the condition requiring the Appellant to remain in the employ of the group until the last three tranches fell due was not fulfilled, neither he nor his cessionary was entitled to delivery of the shares. Their rights were limited to those prescribed in the trust deed, namely, to have the shares purchased from them by the trustees at a price calculated in terms of the deed. That price had in fact been tendered but refused. There is accordingly no merit in this ground for claiming the shares.

[206] Although result reached in these proceedings may at first blush seem harsh in the light of the fact that the Appellant worked for the Bateman group for 18 years and undoubtedly contributed to its growth and success over that period, one should also bear in mind that he was handsomely remunerated for his services over that period and, moreover, that the value of tranches of shares which he did receive was, at the time when he received them, in region of R12 million. One should also not forget that he had ultimately caused the group substantial losses. Moreover, he was offered extremely generous terms of settlement – the last being in a amount of R5 million – but saw fit to reject them and to attempt to extract still more money from the Respondents. One cannot help but conclude that it was his own greed that was mainly responsible for the predicament in which he now finds himself and that this is not an unjust result.

[207] Turning lastly to the question of costs, there can be no doubt that the Court **a quo** was correct in ordering that the costs should follow the result. The special order as to the costs relating to the Appellant's allegations of rigged figures and conspiracy was also, to my mind, fully justified after it had emerged that these allegations were entirely without foundation.

[208] The appeal is accordingly dismissed with costs, including the costs consequent on the employment of two Counsel.

N S PAGE

ACTING JUDGE OF THE LABOUR COURT

I agree

R M M ZONDO

JUDGE PRESIDENT OF THE LABOUR APPEAL COURT

I agree

C R NICHOLSON

JUDGE PRESIDENT OF THE LABOUR APPEAL COURT

For the Appellant:

T C TIEDEMAN

Instructed by:

WEBBER WENTZEL BOWENS

For the Respondents:

P J PRETORIUS S.C.

With Him:

C E WATT-PRINGLE

Instructed by:

JUSTIN LAPIN ATTORNEYS

Dates of Hearing: 11 and 12 September 2001

Date of Judgment: 7 February 2002