IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in Johannesburg

Case no: JA 11/06

In the matter between

Dr D.C. Kemp t/a Centralmed **Appellant**

And

MB Rawlins **Respondent**

JUDGMENT

ZONDO JP

Introduction

[1] I have had the opportunity of reading the judgment prepared by Waglay JA in this matter. Although I agree with the order he proposes, my reasons for agreeing with that order are those set out below.

[2] Waglay JA has in his judgment set out the relevant facts of this case. I do not propose to repeat that exercise in this judgment. As Waglay JA points out in his judgment, the appellant did not pursue his appeal against the declaratory order made by the Labour Court that the respondent's dismissal was substantively unfair. One issue for decision in this appeal is whether or not the Labour Court was correct in awarding compensation to the respondent. If this Court

finds that the Labour Court should not have awarded the respondent any compensation, that would be the end of the matter and it would uphold the appeal and make such order as to costs as it deems appropriate to make. If, however, this Court finds that the Labour Court was correct in deciding to award the respondent compensation, the next question would be whether it ought to have awarded the amount of R120 000,00 that it awarded or whether it should have awarded her a lesser amount.

Discretion

[3] Whether or not the Labour Court ought to have awarded the respondent compensation depends upon whether or not its decision to award compensation was the result of the exercise of a true discretion because, if it was, then this Court would only be entitled to interfere with the exercise of such discretion on very limited grounds. However, if it was not, then this Court would be at large to decide the issue according to its own judgement.

[4] A true discretion is also referred to as a narrow discretion. (see **EM Grosskopf JA in MWASA v Press Corporation of SA Ltd 1992(4)SA 791 (A) at 800 D-E**. In the MWASA case the Court referred to a quotation from an article by Henning: "**Diskresie uitoefening** " in 1968 THRHR 155 at 158 where the author said:

> "**A truly discretionary power is characterised by the fact that a number of courses are available to the repository of the power (Rubinstein Jurisdiction and Illegality (1956) at 16)".**

After this quotation in the MWASA case EM Grosskopf JA said at 800 E – F:-

> **"The essence of a discretion in this narrower sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him."**

[5] In MWASA's case the Appellate Division had to decide on the nature of the power given to the now defunct Labour Appeal Court ("**the old LAC**") created under the Labour Relations Act, 1956, as amended when it dealt with appeals from industrial court determinations of unfair labour practices under sec 46(9) of that Act. It considered whether such a decision fell under the category of questions of law, the category of questions of fact or the category of questions of judicial discretion

[6] In MWASA's case the Appellate Division referred, with approval, through EM Grosskopf JA, to *Salmond on Jurisprudence* 12th ed at 70 – 1 where different categories of matters that come before courts are discussed. The part in Salmond's work which was quoted in MWASA's case reads:

> "**matters and questions which come before a court of justice, therefore, are of three classes:**
>
> **(1) matters and questions of law – that is to say, all that are determined by authoritative legal principles;**
>
> **(2) matters and questions of judicial discretion – that is to say, all matters and questions as to**

what is right, just, equitable or reasonable, except so far as determined by law;

In matters of the first kind, the duty of the Court is to ascertain the rule of law and to decide in accordance with it. In matters of the second kind, its duty is to exercise its moral judgment in order to ascertain the right and justice of the case. In matters of the third kind, its duty is to exercise its intellectual judgment on the evidence submitted to it in order to ascertain the truth."

That is how the quotation from Salmond on Jurisprudence appears in EM Grosskopf JA's judgment in MWASA's case at 796 F – H. It will be seen that, although three classes of matters were supposed to be listed according to the opening part of the quotation, only two are listed – that is (1) and (2), there is in the last sentence of the quotation a reference to "**matters of the third kind**". That class of matters referred to as the "**third kind**" is not in the quotation appearing in the MWASA judgment of EM Grosskopf JA. Its omission must have been an error because, if one goes back to *Salmond on Jurisprudence* 12th ed page 70, the third kind of matters that come before Courts is there. For convenience and for the sake of completeness I quote the relevant passage from *Salmond on Jurisprudence* hereunder together with the part omitted in MWASA's case. It reads as follows"

"**Matters and questions which come before a court of justice, therefore, are of three classes:**

(1) Matters and questions of law – that is to say, all that are determined by authoritative legal principles;

(2) Matters and questions of judicial direction – that is to say, all matters and questions as to what is right, just equitable, or reasonable, except so far as determined by law;

(3) Matters and questions of fact – that is to say, all other matters and questions whatever.

In matters of the first kind, the duty of the court is to ascertain the rule of law and to decide in accordance with it. In matters of the second kind, its duty is to exercise its moral judgment, in order to ascertain the right and justice of the case. In matters of the third kind, its duty is to exercise its intellectual judgment on the evidence submitted to it in order to ascertain the truth."

In the next paragraph in MWASA's case at 796 H - I EM Grosskopf JA pointed out that in the above passage the word "**discretion**" was used "**in a wide sense to convey** '**the action of discerning or judging; judgment; discrimination (The Shorter Oxford Dictionary SV discretion.**"

[7] In Ex Parte Neethling and others 1951(4) SA 331 (A) the Appellate Division had to deal with an appeal from a decision of a Provincial Division of the High Court in terms of which the Provincial Division had dismissed an application made to it in terms of sec 87 of the Administration of Estates Act 24 of 1913 for an order authorising the sale of a certain property in terms of a deed of sale. Some of the parties to the deed of sale were minors and were represented by their natural guardians. The need for the authority of the court arose out of the provisions of a joint will and the fact

that some of the parties involved were minors. The Provincial Division had refused to grant the authority on the basis that it was not satisfied that the proposed contract of sale of the property was in the interests of all minors concerned.

[8] On appeal to the Appellate Division, the Court, through Greenberg JA, said that the duty imposed on the Provincial Division, as upper guardian of all minors within its jurisdiction, "**was that, in the exercise of its discretion (I am assuming in favour of the appellants that it is a judicial and not an administrative discretion) it should decide whether the proposed contract was in the interest of the minors and it was contended that it should be approved, notwithstanding that it was in conflict with the provision of the will.**" (p.334 H-335A). Greenberg JA went on to say at 335 A - J:-

> "**I think, therefore, that, if an appeal lies, this Court would be entitled to interfere, not on the ground that in its opinion the contract was not in the interest of the minors, because if it did so it would be substituting its discretion for that of the upper guardian but only if it came to the conclusion that the Court a quo had not exercised a judicial discretion. Rex v Zackey, 1945 AD 505, dealt with the question of an appeal court's power to overrule a lower court's decision where the decision had been on a matter within the discretion of such lower court and three classes of such cases were referred to, viz decision on the question of costs, on a postponement and on an amendment of pleadings in the lower court. To these might be added the question of an alteration of**

> **sentence on appeal (see Rex v Ramanka 1949 (1) SA 417). I see no distinction in principle between these and the present case. At p. 513 of the report in Rex v Zackey, supra, instances were given to show what is meant by 'judicial discretion' and these instances are apposite here (see also Merber v Merber, 1948(1) SA 446, and Levin v Felt and Tweeds Ltd, 1951(2) SA 401 at p.416). Can it be said in the present case that the Court a quo has exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons? I can see no ground for answering this question in the affirmative."** (p.335 A-G).

The Court dismissed the appeal. Schreiner, Van den Heever, Hoexter and Fagan JJA concurred in the judgment of Greenberg JA.

[9] In **Knox D' Arcy Ltd and others v Jameson and others 1996(4) SA 348 (A)** the Appellate Division had to deal with an appeal from a decision dismissing an application for an interdict. It was argued that a decision refusing an application for an interdict was a decision which a court takes in the exercise of a discretion and that an appeal court dealing with an appeal from such a decision does not decide the appeal on the basis whether the decision was right or wrong. It was argued that the court could only interfere on appeal with such a decision if the court a quo had not exercised its discretion properly. The Court, through EM Grosskopf JA, with whom Nestadt, FH Grosskopf, Harms and Scott JJA concurred, examined some of the cases in which the Appellate Division had

considered decisions refusing an application for an interdict. The cases were **Messina (Transvaal) Development Co Ltd v South African Railways and Harbours 1929 AD 159**, **Goldsmid v The South African Amalgamated Jewish Press Ltd 1929 AD 441**, **Erikson Motors (Welkom) Ltd v Protea Motors, Warrenton and Anohter 1973(3) SA 685 (A)** and **Cassim & others v Meman Mosque Trustees 1917 AD 154**. Grosskopf JA said that in those cases the Appellate Division had decided appeals against decisions refusing applications for interdicts on the basis of it making up its own mind on whether or not an interdict should have been granted. He said that the Appellate Division had not decided the cases on the basis that it could only interfere with the decision of the court of first instance on limited grounds. He said that it seemed to him that in those cases the Appellate Division had not used the term "**discretion**" "**in a strict sense**".

[10] At 362 D-E in Knox D'Arcy EM Grosskopf JA pointed out that, if a court had "**a truly discretionary power in an application for an interim interdict, it would mean that in principle on identical facts it could choose whether to grant or refuse an interdict and a Court of Appeal would not be entitled to interfere merely because it disagreed with the lower court's choice (Perskor case at 800 D-F). I doubt whether such a conclusion could be supported on the grounds of principle or policy. As I have shown, previous decisions of this Court seem to refute it**." Thereafter, EM Groskopf JA said that the statement that "**a Court has a wide discretion seems to mean no more than that the Court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision.**" The

Appellate Division decided to deal with the matter on the same basis as it had dealt with appeals against refusals of applications for interim interdicts in the cases to which EM Grosskopf JA had referred.

[11] The case of **Benson v SA Mutual Life Assurance Society 1986(1) SA 776 (A)** concerned the delivery of shares (i.e. specific performance). It dealt with the discretion of a court in the context of its power to grant or refuse an order for specific performance. The Appellate Division stated that "**(i)t is an equally well-settled principle that the power to interfere on appeal in matters of discretion is strictly circumscribed**" (p.781 I-J). Hefer JA, who wrote for a unanimous Court, then referred to Greenberg JA's judgment in Ex Parte Neethling with approval in relation to the limited grounds upon which an Appeal Court may interfere with a decision taken by a lower Court in the exercise of a discretion (see p.781 I – 782A). Hefer JA said that the approach set out in Greenberg JA's judgment was the approach that should be adopted in the case before him (p.782A).

[12] At 798 in MWASA's case the Appellate Division, after considering the definition of "**unfair labour practice**" contained in the Labour Relations Amendment Act 83 of 1988, said that in determining whether or not conduct constituted an unfair labour practice as therein defined, the Court was required not only to decide whether the effects envisaged in the definition had been caused or could be caused but was also required to have "**regard to considerations of fairness or unfairness.**" It then said:

> "**Clearly, the Court's view as to what is fair in the circumstances is the essential determinant in deciding the ultimate question**."

The ultimate question to which the Appellate Division was referring was the question whether the conduct concerned, e.g. dismissal, constituted an unfair labour practice. At 798 H-I the Appellate Division said through EM Grosskopf JA:

> "**In my view a decision of the Court pursuant to these provisions is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinions**."

At 799 D-E EM Grosskopf JA said that the determination of the ultimate question, i.e. the question whether a dismissal constituted an unfair labour practice – did not fall into the category of questions of law, but into the category of questions of judicial discretion as contemplated in the second kind of question that comes before Courts as suggested in *Salmond on Jurisprudence* at 70-1. The Appellate Division emphasised at 799D-E that the determination of the question whether or not a dismissal constituted an unfair labour practice "**is a question which, in the final analysis, has to be answered in accordance with conceptions of fairness. It cannot be answered by applying rules of law, nor can it be determined by way of proof or demonstration in the manner in which facts are proved.**"

[13] It is clear from the aforegoing that the Appellate Division regarded the category of questions relating to judicial discretion in *Salmond on Jurisprudence* as not relating to a true discretion. That is why

EM Grosskopf JA said at 796 H-I and 800 C-D that that was a discretion in the wide sense. At 800D EM Grosskopff JA quoted Henning: **Diskresie-uitoefening**" in 1968 THRHR 155 at 158 where true discretionary power was described as being characterised "**by the fact that a number of courses are available to the repository of the power**." That is the discretion in the true sense – the discretion that is usually referred to as the discretion in the narrow sense. Immediately after this, EM Grosskopf JA said at 800 F-G:

> "**The essence of a discretion in this narrow sense is that, if the repository of power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him. I do not think the power to determine that certain facts constitute an unfair labour practice is discretionary in that sense. Such a determination is a judgment made by a Court in the light of all relevant considerations. It does not involve a choice between permissible alternatives. In respect of such a judgment a Court of appeal may, in principle, well come to a different conclusion from that reached by the Court a quo on the merits of the matter. In the field of unfair labour practices this has been accepted by this Court in the Ergo and Macsteel cases.**"

[14] In MWASA's case EM Grosskopf JA went on to point out at 800G that, even in those cases where the decision is not discretionary in the narrow sense, "**there may be features in the nature of the**

decision or the composition of the tribunal a quo which might call for restraint by a Court of Appeal in the exercise of its powers." He said that in such cases **"(s)uch restraint would then, however, be exercised for policy reasons, and would not, as with discretionary decisions, flow necessarily from the nature of the decision appealed against**" (p800H).

[15] In **Hix Networking Technologies v System Publishers (Pty)Ltd 1997 (1) SA 391 (A)** the Court dealt with a decision of a Provincial Division of the High Court dismissing an application for an interim interdict restraining the publication of an allegedly defamatory matter. There, the Court, through Plewman JA, referred to the Knox D' Arcy case at 361 B-E and concluded, in the light of that decision, that the refusal or granting of an application for an interim interdict is not a decision that is taken in the exercise of a true discretion and that the Court of Appeal was entitled to decide the appeal on the basis of its own view of the merits of the case (see p.402 A-C of the judgment).

[16] The next case that I need to refer to is **Shepstone & Wylie & others v Geyser N.O. 1998(3) SA 1036(SCA)**. However, before I do so, it is necessary to quote the provisions of sec 13 of the Companies Act 61 of 1973 which were the focus of attention in that case. Sec 13 of the Companies Act reads as follows:

> "**Where a company or other body corporate is plaintiff or applicant in any legal proceedings, the court may at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate or, if it is being wound up, the liquidator thereof, will be**

> **unable to pay the costs of the defendant or respondent if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings till the security is given.**"

In that case (i.e. the Shepstone & Wylie case) the Supreme Court of Appeal dealt at 1044J – 1045E with the issue of interference by a Court of appeal with the exercise of a discretion by a lower Court or a Court of first instance. Hefer JA, writing for a unanimous Court, pointed out at 1044 J – 1045A that there were numerous judgments of the Supreme Court of Appeal which were to the effect that the power to interfere on appeal with the exercise of a discretion is limited to cases in which it is found that the lower Court or Court of first instance had exercised its discretion capriciously or upon a wrong principle, or had not brought its unbiased judgment to bear on the question, or had not acted for substantial reasons. In support of this statement Hefer JA referred to **Benson v SA Mutual Life Assurance Society 1996(1) SA 776(A)** at 781I - 782B and the cases cited therein. Hefer JA then continued and said that the judgment in **Knox D'Arcy, supra,** revealed, however, "**that this is not the correct approach in cases where the word 'discretion' is not used in the strict sense"** (p.104 5A-C). What Hefer JA was saying was that in those cases where the word "**discretion**" is used in a **"non-strict"** sense, the principle that an appellate court does not interfere lightly with the exercise of a discretion by a lower court does not apply. In such a case the Court of appeal is entitled to come to its own decision in accordance with its own view of the merits of the case.

[17] Hefer JA gave an example of a case where it could be said that the word "**discretion**" is used in the **"non-strict"** sense or in a loose sense. He said that that is when it is said that the court has a discretion to grant an interim interdict. He said that, when that is said, it is meant to convey that the court is entitled to have regard to a number of disparate and incommensurate features in coming to a conclusion. In this regard he referred to the judgment of EM Grosskopf JA at 361 H-I in the Knox D'Arcy case. Hefer JA went on to say that in such a case the Court of appeal is at liberty to decide the matter according to its own views of the merits.

[18] In **National Coalition for Gay and Lesbian Equality v Minster of Home Affairs 2000 (2) SA 1 (CC)** the Constitutional Court had to deal inter alia with an appeal against a decision of a High Court dismissing an application for a postponement of a matter. At 14 A-E (par 11) the Constitutional Court, through Ackerman J, said about the power of an appeal court to interfere with a decision of a lower Court arrived at pursuant to the exercise of a discretion:

> "[11] **A Court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the Court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably**

> **have been made by a court properly directing itself to all the relevant facts and principles. On its face, the complaint embodied in the ground of appeal sought to be introduced by the amendment does not meet this test because it alleges only an error in the exercise of its discretion by the High Court. Even assuming, however, that such ground correctly formulates the test which would permit interference by this Court, the respondents have got nowhere near to establishing such a ground on the facts before the High Court. No such vitiating error on the part of the High Court was contended for by the respondents in their written or oral argument before this Court and none can, on the papers, be found. In fact I am of the view that the High Court correctly dismissed the application for good and substantial reasons and that both the applications in this Court relating to such dismissal ought to be refused."**

[19] Against what has been said above, the question arises then whether deciding whether the power given by sec 193(1)(c) of the Labour Relations Act, 1995 (Act 66 of 1995) ("**the Act**") to the Labour Court or an arbitrator to award or not to award compensation in a case where it has found the dismissal of an employee unfair involves the exercise of a true discretion (i.e the narrow discretion). Sec 193(1)(c) reads:

"**193. Remedies for unfair dismissals-(1) if the labour court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the court or the arbitrator may –**

(a) ……..
(b) ……..
(c) order the employer to pay compensation to the employee".

[20] There are many factors that are relevant to the question whether the court should or should not order the employer to pay compensation. It would be both impractical as well as undesirable to attempt an exhaustive list of such factors. However, some of the relevant factors may be given. They are:

(a) the nature of the reason for dismissal; where the reason for the dismissal is one that renders the dismissal automatically unfair such as race, colour, union membership, that reason would count more in favour of compensation being awarded than would be the case with a reason for dismissal that does not render the dismissal automatically unfair; accordingly, it would be more difficult to interfere with the decision to award compensation in such case than otherwise would be the case;

(b) whether the unfairness of the dismissal is on substantive or procedural grounds or both substantive and procedural grounds; obviously it counts more in favour of awarding

compensation as against not awarding compensation at all that the dismissal is both substantively and procedurally unfair than is the case if it is only substantively unfair, or, even lesser, if it is only procedurally unfair;

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

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

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

(f) the need for the courts, generally speaking, to provide a remedy where a wrong has been committed against a party to litigation but also the need to acknowledge that there are cases where no remedy should be provided despite a wrong

having been committed even though these should not be frequent.

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

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

[21] From the above it is clear that in the case of a narrow discretion – that is a situation where the tribunal or Court has available to it a number of courses from which to choose – its decision can only be interfered with by a Court of appeal on very limited grounds such as where the tribunal or Court:

(a) did not exercise a judicial discretion or;
(b) exercised its discretion capriciously or;
(c) exercised its discretion upon a wrong principle or;
(d) has not brought its unbiased judgment to bear on the question or;
(e) has not acted for substantial reasons;
(see Ex Parte Neethling and others 1951(4) SA 331 (A) at 335) or;
(f) has misconducted itself on the facts (Constitutional Court judgment in the National Coalition for Gay and Lesbian Equality case at par 11);

(g) reached a decision in which the result could not reasonably have been made by a Court properly directing itself to all the relevant facts and principles (Constitutional Court judgment in National Coalition for Gay and Lesbian Equality at par 11).

Although the principle is that the exercise of a true discretion by a Court of first instance or by a tribunal can only be interfered with by an Appeal Court on limited grounds, the list of those grounds on which interference is permissible is not so short any more as can be seen above..

[22] I do not think that the provisions of sec 193 (1) (c) of the Act give the Labour Court or an arbitrator the kind of power which would enable it or him to grant or refuse an order of compensation on identical facts as it or he sees fit. In my view the ultimate question that the Labour Court or an arbitrator has to answer in order determine whether compensation should or should not be granted is: which one of the two options would better meet the requirements of fairness having regard to all the circumstances of this case? If however the Court or arbitrator answers that the requirements of fairness, when regard is had to all of the circumstances, will be better met by denying the employee compensation, no order of payment of compensation should be made. If the Court or arbitrator answers that the requirements of fairness will be better met by awarding the employee compensation, then compensation should be awarded. When that question is answered, the interests of both the employer and the employee must be taken into account together with all the relevant factors. In my view, where the court or an arbitrator decides the

issue of whether or not to award the employee compensation, it does not exercise a true discretion or a narrow discretion. The determination of that question or issue requires the passing of a moral or value judgment. It is decided or determined on the basis of the conceptions of fairness because the Court or arbitrator has to look at all the circumstances and say to itself or himself or herself as the case may be: What would be more in accordance with justice and fairness in this case? Would be to award compensation or would it be to refuse to award compensation? It or he or she would then have to make the decision in accordance with its, his or her sense of which of the two options would better serve the requirements of justice and fairness.

[23] In MWASA's case the Appellate Division said that determining whether an employer' conduct in dismissing an employee is fair or not fell within the second kind of matters that come before Courts as listed in *Salmond on Jurisprudence*. The second kind refers to matters of judicial discretion. The Court explained that the word "**discretion**" in the relevant passage of Salmond on Jurisprudence was not used in the sense of a narrow discretion but in the sense of a wide discretion. The Appellate Division explained in MWASA's case that matters falling under judicial discretion in *Salmond of Jurisprudence's* kinds of matters at 70 – 71 were not matters in which an Appeal Court's power to interfere with a lower Court's decision is circumscribed. In such a case an Appeal Court is at large to come to its own decision on the merits of the case. Accordingly, this Court is at large to determine that issue according to its own view of the merits of the case. A challenge to an order of the Labour Court awarding or refusing an employee compensation

in terms of sec 193 (1) (c) of the Act is not limited to the grounds applicable where an order is made pursuant to the exercise of a true discretion or narrow discretion. It is only in regard to the determination of the amount of compensation that the Labour Court or arbitrator exercises a true or narrow discretion. It is in regard to that decision that this Court's power to interfere is circumscribed and can only be exercised on the limited grounds referred to earlier in this judgment. In the absence of one of those grounds this Court has no power to interfere with the amount of compensation determined by the Labour Court. I now proceed to consider whether or not, in the light of the aforegoing and all the relevant factors, the Labour Court was correct in awarding compensation to the employee in this case.

Was the Court a quo correct in deciding to award the respondent compensation?

[24] The Court a quo rejected the respondent's contention that the reason why the respondent was dismissed was her pregnancy. It said that no evidence whatsoever was tendered to substantiate the respondent's allegation in this regard. However, as already pointed out earlier, the Court a quo found that the respondent's dismissal was both substantively and procedurally unfair.

[25] The appellant made an offer to the respondent to reinstate her. One of the factors that the Court a quo considered in connection with compensation was whether or not the respondent's rejection of the appellant's offer of reinstatement was reasonable. It would appear that the Court a quo considered this issue in relation to what the "**appropriate compensation**" should be (see par 45 of the

judgment) as opposed to whether or not it should award compensation.

[26] During argument Counsel for the respondent conceded that the appellant's offer was genuine and reasonable. I can add that the appellant's conduct in making an offer of settlement was in line with one of the primary objects of the Act namely, the effective resolution of disputes. It would seem that the respondent's reason for not accepting the offer was that she felt that she could no longer work with the appellant. There seems to be no basis for that suggestion because the two would be working in different places and there would be minimal contact between them. The appellant may have treated the respondent unfairly when he dismissed her in the manner in which he did but he had "**a right to seek to right the wrong**" that he had committed by offering to put the respondent back in the position in whichs she would have been in had she never been dismissed. It is what I call an employer's "**right to right a wrong.**" And, if that offer was genuine and reasonable, as it has been conceded on behalf of the respondent it was, I cannot see why the appellant must be ordered to pay her compensation which would not have arisen if the respondent had accepted the offer of reinstatement. In my view it is very important to affirm the employer's "**right to right a wrong**" that he or she has made in these kinds of circumstances. If an employer unfairly dismisses an employee and he wishes to reverse that decision, he must be able to do so, and if the employee fails to accept that offer for no valid reason, the employer has a strong case in support of an order denying the employee compensation. (See in this regard the passage quoted from my judgment in Chemical Workers Industrial

Union v Johnson & Johnson (Pty) Ltd [1997] 9 BLLR 1186 (LC) at 1198 E – H as quoted by this Court on appeal in Johnson & Johnson (Pty) Ltd v CWIU (1999) 20 ILJ (LAC) at par 49 p. 102.)

[27] It seems that one basis upon which the Court a quo sought to justify its decision to award the respondent compensation was that "**(t)he manner in which the [appellant] went about dismissing the [respondent] and his timing is deserving of censure"**. (par 52 of the judgment of the Court a quo). However, the Court a quo did not offer much by way of substantiation of this statement. Another basis seems to have been that the dismissal was both substantively and procedurally unfair. In par 46 of its judgement the Court a quo stated that "**(t)his in itself justifies an award of compensation."** While it is true that, in the case of a dismissal that is both substantively and procedurally unfair, it would be difficult to find a situation where the employee is awarded neither reinstatement nor compensation, this does not mean that there are no such situations. The Court has to consider all the relevant circumstances and make such order as it deems fair to both parties in the light of everything. In my view this is a case where it would have been justified for the Court a quo to deny the respondent compensation despite the fact that her dismissal had been found to have been both substantively and procedurally unfair.

[28] I have already referred to the fact that the Court a quo dealt with the question of whether or not to award compensation on the basis of whether or not the respondent's rejection of the appellant's offer of reinstatement was unreasonable. Whether or not the rejection of the employer's offer of reinstatement by an employee is reasonable

is a question that applies to a case where an employee who was dismissed for operational requirements rejected an offer of alternative employment offered by the employer or offered by another party at the instance of the employer and the Court must decide under s41 of the Basic Conditions of Employment Act, 1998 whether he is entitled to payment of severance pay. But that is because sec 41 of the Basic Conditions of Employment Act, 1998 makes the unreasonableness or otherwise of the rejection of the offer of alternative employment by the employee the test for determining whether or not the employee forfeits the severance pay.

[29] In this case there is no statutory provision that makes the unreasonableness or otherwise of an employee's rejection of the offer the determining factor. As I have already said, the question, it seems to me, is whether or not it is to award or not to award compensation that would better serve the requirements of fairness in the matter. In Johnson & Johnson (Pty) Ltd v CWIU & others (1999) 20 ILJ 89 (LAC) this Court held in par 40 that the Labour Court has a "**discretion**" to award or not to award compensation. Froneman DJP, who wrote for a unanimous Court, did not explain whether the discretion to which he was referring was the narrow one (i.e. the true discretion) or the wide discretion. I have already expressed the view earlier in this judgment that it is not the true discretion or narrow discretion.

[30] In my view the following factors justify the conclusion that the respondent should have been denied compensation in this case:

(a) a genuine and reasonable offer of reinstatement was made to her which she did not accept;

(b) had the respondent accepted the appellant's offer of reinstatement,

(i) she would not have suffered any financial loss which she may have suffered as a result of her dismissal;

(ii) the dispute between the parties would have been resolved without the appellant having to incur the legal costs that he must be taken to have incurred in defending the unfair dismissal claim and the costs relating to this appeal;

(iii) the respondent would not have incurred the legal costs that she must be taken to have incurred through this litigation both in the Labour Court and in this Court.

(c) for some time after the appellant had made the offer of reinstatement to the respondent, the respondent did not even bother to respond to the appellant – and that is conduct which is unacceptable, particularly when one of the parties is trying to have the dispute resolved. Such conduct undermines one of the primary objects of the Actwhich is the effective (which includes expeditious) resolution of disputes: it is better that disputes be resolved through conciliation than through litigation or arbitration or industrial action.

The conclusion that the employee should not have been awarded compensation in this case seems to be quite in line with the decision of this Court to the same effect in Johnson & Johnson,

supra, particularly if regard is had to paragraphs 41 – 43 and paras 49 – 51 of this Court's judgment.

[31] With regard to costs I have been seriously tempted to order the respondent to pay the appellant's costs but have decided that I should not make any order of costs

[32] In the premises I agree with the order proposed by Waglay JA.

ZONDO JP

I agree.

Waglay JA.

WAGLAY, JA.:

[33] The respondent was dismissed from her employ as a medical doctor on 1 February 1998. Believing that she was dismissed because of her pregnancy, she instituted proceedings against the appellant, her employer, on the basis that her dismissal constituted an automatically unfair dismissal as contemplated by s187 (1) (e) of the Labour Relations Act no 66 of 1995 (hereinafter "the LRA"). The appellant contended that the dismissal was fair because it was motivated by considerations of the appellant's

operational requirements and, in any event, was effected at the instance of the respondent's husband.

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[34] The Court *a quo* (per Gush AJ) found that the dismissal of the respondent was not based on her pregnancy and, therefore, was not automatically unfair. It found that the dismissal was based on the appellant's operational requirements but that it was both procedurally and substantively unfair. The Court *a quo* in consequence ordered the appellant to pay the respondent twelve months salary as compensation amounting to R120 000,00.

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[35] Leave to appeal was refused by the Court *a quo* and granted on petition to the Judge President of this Court.

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[36] The appellant did not appeal against the declaratory order of the Court *a quo* that the respondent's dismissal was procedurally unfair. In his notice of appeal he contended that the Court *a quo* erred in three respects: (i) finding that the dismissal was substantively unfair; (ii) finding that compensation should be paid; and (iii) awarding compensation equal to 12 months salary amounting to R120 000,00.

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[37] The appellant has since abandoned the appeal against the order that the dismissal was substantively unfair. Accordingly, the issues to be determined in this appeal concern whether or not compensation should have been awarded to the appellant pursuant to her unfair dismissal, and if so whether the award of 12 months compensation was just and equitable in the circumstances.

[38] Briefly the background to the matter is that the appellant, also a medical doctor, conducted his medical practice in Bloemfontein. In the beginning of 1997 he purchased a second medical practice ("satellite practice") and employed the respondent in that practice. The respondent commenced employment on 1 February 1997 at the net monthly salary of R10 000.00. The respondent ran the satellite practice independently of the appellant.

[39] The respondent became pregnant and advised the appellant thereof. The parties agreed that the respondent would take maternity leave for a period of two months commencing on 1 February 1998. Two weeks of the two months leave would be taken as paid annual leave and the balance was to be unpaid leave.

[40] The appellant's testimony was to the effect that despite all his efforts to make the satellite practice successful it continued to run

at a loss. His only option was to replace the respondent with a doctor whom he could pay a lesser salary than what he paid the respondent. Accordingly, on the day before the respondent was to commence her maternity leave, he informed her that she should attempt, during her maternity leave, to find alternative employment. The appellant added that later that day the respondent's husband telephoned him demanding that he (the appellant) give the respondent a written notice that her employment had been terminated. This he did. Appellant says that the only reason he wrote the letter of termination was that the respondent's husband, in a heated telephonic discussion, insisted that he should do so. The appellant denied that the dismissal was in any way related to the respondent's pregnancy and confirmed that he had employed a doctor in place of the respondent as and from 1 February 1998 at a salary of R8 000,00 per month which was R2 000,00 less than the salary he paid the respondent.

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[41] The respondent's evidence on the other hand was to the effect that on 31 January 1998 she had gone to collect her salary cheque at the appellant's home. At the appellant's home she was advised by him that he could no longer retain her in his employ as she was too expensive. She said that she responded by saying that she could

not work for a lesser salary because her husband was still a student. The appellant then reacted by telling her that he had already employed someone else in her place. Her services were thus terminated. The respondent said that she became extremely upset by these turn of events and on her return home spoke to her husband about it. Her husband then telephoned the appellant and asked him for a written notice of termination of employment and the appellant supplied the letter. The respondent stated that she believed that she was dismissed because of her pregnancy.

[42] The respondent gave birth on 4 February 1998, four days after her dismissal and only commenced her new employment on 1 September 1998.

[43] Although the appellant conceded that he had not complied with any of the procedural requirements as set out in s189 of the LRA he contended that the dismissal was justified by reason of the financial state of his satellite practice. I may at this stage add that the Court *a quo* found that the financial statements relied on by the appellant to substantiate that the satellite practice was running at a loss was at best "incomplete" and "unconvincing" and were simply prepared to justify the appellant's contention that it had become

necessary to replace the respondent with a doctor who was prepared to accept a lesser salary. The Labour Court also, correctly, did not accept that the respondent was dismissed at the instance of her husband as claimed by the appellant.

[44] Once the respondent, through her trade union, served the referral of her dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), for conciliation, the appellant through his attorneys wrote to the respondent's trade union offering to reinstate the appellant alternatively to make a payment to her in settlement of the dispute. The offer which was made on 12 March 1998 was the following:

> *"We would like to make the following offer to your client in order to settle the dispute. Our offer is as follows:*
>
> *1) Our client offers reinstatement of your client, to be reinstated after her maternity leave, being such date as in terms of the Basic Conditions of Employment Act,753 of 1988* (sic)*; or*
>
> *Alternatively to the above our client offers to pay your client:*
>
> *1) One month's notice as in terms of the contract of employment; and*

2) Our client will make payment to your client of one week severance pay for each completed year of service; and

3) Our client will compensate your client for the period 1 February 1998 to 12 March 1998 being the date of this offer."

[45] The respondent did not react to the above offer. A few days later, on 17 March 1998, the appellant again offered to reinstate the respondent but the respondent refused such offer and demanded compensation equal to 12 months salary. After the respondent had instituted her claim for automatically unfair dismissal in the Labour Court, the appellant yet again offered her reinstatement stressing that the personal contact between the two would be minimal as the respondent worked independently of the appellant. The offer as contained in the letter of 2 October 1998 stated the following:

"Dit is ons instruksies om ter beslegting van hierdie geskil die aanbod wat op 12 Maart 1998 reeds aan u klient gemaak is te herhaal en wel as volg:

1. Ons klient bied hiermee aan om u klient onvoorwaardelik in diens te herstel op dieselfde terme en voorwaardes wat gegeld het tydens diensbeëindiging.

2. Aangesien u klient nie ons klient se vorige aanbod aanvaar het nie, sluit hierdie aanbod

ongelukkig nie betaling van salaris vir die tydperk tussen diensbeëindiging en aanvaarding van hierdie aanbod in nie.

Ons wys graag daarop dat u klient voorheen en soos voorsien in die toekoms geheel en al op haar eie gefunksioneer het in 'n afsonderlike mediese praktyk en dat minimale kontak tussen haar en ons klient bestaan. Ons is derhalwe van mening dat die voorgesette werkgewer/werknemer verhouding tussen die partye wel moontlik is.

Indien die bogemelde aanbod nie vir u klient aanvaarbaar is nie, verneem ons graag welke alternatiewe voorstelle gemaak kan word ten einde hierdie geskil te besleg."

[46] The offer of reinstatement was also repeated in the appellant's response to the respondent's statement of claim. Respondent rejected these offers.

[47] During the trial the respondent testified that in referring the matter to the CCMA the relief sought was compensation and not reinstatement. She indicated that she could not continue to work for the appellant because of the manner in which she had been treated by the appellant on the day that her services were

terminated. She also confirmed that at the time that the offers were made to her she was unemployed.

[48] Taking into account that the respondent had agreed to take six weeks unpaid leave she would have been on unpaid leave from 14 February to 31 March. The respondent was therefore effectively unemployed as from 1 April 1998 to 31 August 1998 – a period of five months. She commenced her new employment on 1 September 1998 at a salary in excess of what she earned in the appellant's employ.

[49] Based on the above facts and circumstances the first issue to be considered is whether or not the respondent was entitled to be awarded compensation for being unfairly dismissed.

[50] In terms of the LRA, although every employee has the right not to be unfairly dismissed (s185 (a)) the infringement of that right does not necessarily or automatically confer a right to a remedy. The remedies that are available to an unfairly dismissed employee are set out in s193 (1) read with s194 of the LRA.

[51] In terms of s193 (1) and (2) of the LRA where a dismissal is found to be unfair:

> *"(1) . . .*
>
> *. . . the Court or the arbitrator may-*
>
> *(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;*
>
> *(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date of dismissal; or*
>
> *(c) order the employer to pay compensation to the employee.*
>
> *(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-*
>
> *(a) the employee does not wish to be reinstated or re-employed;*
>
> *(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;*
>
> *(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or*
>
> *(d) the dismissal is unfair only because the employer did not follow a fair procedure."*

[52] Section 194 (1) then goes on to provide:

> *"(1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of the dismissal."*

[53] Hence, once a finding is made that a dismissal is unfair an arbitrator or the Labour Court must exercise a discretion as provided in s193(1). The discretion that is conferred on the arbitrator or the Labour Court by s193 (1), (because of the use of the word **"may**" in the commencement of this section which says ***"…the court or the arbitrator may*)**, limits the decision the arbitrator or the Labour Court may make. (See in this regard **Johnson and Johnson (Pty) Ltd v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC)** at para 38). The discretion that must be exercised by the arbitrator or the Labour Court, after it has

considered all the relevant factors is whether or not to grant the relief sought in terms of s193 (1). The discretion that must be exercised in granting the relief sought by the respondent in terms of s193(1)(c) is significantly different to the discretion that an arbitrator or the Labour Court has in terms of s194(1) of the LRA.

[54] If the arbitrator or the Labour Court decides to award or order payment of compensation as provided in s193(1) (c) then it must turn to s194(1) to determine the amount of compensation. Although s194(1) sets out the parameters for the amount of compensation the arbitrator or the Labour Court may order, the arbitrator or the Labour Court has a discretion to decide on the appropriate amount. The parameters do not hindre the choice; it merely sets the outer limits beyond which the arbitrator or the Labour Court may not go. Within the limits, however, the arbitrator or the Labour Court may make any decision which it considers to be the correct one.

[55] The importance of the distinction between a discretion that is exercised in terms of s193(1)(c) and a discretion that is exercised in terms of s194(1) is how the reviewing Court will consider the matter. When the discretion that is challenged is a discretion such

as the one exercised in terms of s194 (1) the test that the Court, called upon to interfere with the discretion, will apply is to evaluate whether the decision-maker acted capriciously, or upon the wrong principle, or with bias, or whether or not the discretion exercised was based on substantial reasons or whether the decision-maker adopted an incorrect approach. When dealing with a discretion however such as provided for in s193(1)(c), the Court must consider if the arbitrator or the Labour Court properly took into account all the factors and circumstances in coming to its decision and that the decision arrived at is justified. In essence therefore, a review of a discretion exercised in terms of s193(1)(c) is essentially no different to an appeal because the reviewing Court will be required to consider all the facts and circumstances which the arbitrator or the Labour Court had before it and then decide based on a proper evaluation of those facts and circumstances whether or not the decision was judicially a correct one.

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[56] An unfairly dismissed employee therefore does not obtain a vested right to the remedy provided in s193 (1)(c) of the LRA. All that such employee has is a right to be considered for that remedy. Section 193 (1) thus provides for the general kinds of appropriate orders that the Labour Court or an arbitrator may make and s193

(2) sets out the position with regard to an order in terms of s193 (1) (a) or (b). Section 194 (1) on the other hand deals with the limit to the compensation that may be granted once order is made in terms of s193 (1) (c), and how that compensation is to be calculated; it does not deal with when and why compensation must be ordered.

[57] In this matter the Labour Court found the dismissal of the respondent both substantively and procedurally unfair and exercised its discretion in favour of granting compensation as provided for in s193(1)(c). The Labour Court has not explained the basis for making that decision. However, on appeal this Court is entitled to decide on whether or not the decision was a correct one because the discretion the Labour Court was called upon to exercise was one where the court *a quo* had to make a decision based on the facts and circumstances that were placed before it.

[58] The facts relevant to deciding whether or not to order compensation were the following, that:

(i) the respondent was dismissed on the eve of her commencing her maternity leave;

(ii) the dismissal was both substantively and procedurally unfair;

(iii) the reason proffered for the dismissal was that the respondent was too expensive to retain and the doctor employed in place of the respondent was paid R2 000 less a month;

(iv) immediately on receiving the respondent's referral of her dismissal dispute to the CCMA, the appellant offered her unconditional reinstatement – this offer constituted a full redress in terms of the LRA;

(v) the respondent did not want to be reinstated or re-employed;

(vi) the respondent wanted compensation;

(vii) the respondent failed to respond to the appellant's offer of reinstatement. The appellant then repeated the offer on at least three subsequent occasions; on each occasion the offer of reinstatement was refused with the respondent insisting on compensation as the only relief. The offer of reinstatement was also made at the conciliation meeting held under the auspices of the CCMA;

(viii) had the respondent accepted either the first or the second offer of reinstatement she would not have been out of work for even one day because she was only required to return from maternity leave on 1 April 1998 and these offers to reinstate were made prior to that date;

(ix) the respondent as an employee of the appellant worked independently of the appellant in a separate medical practice with minimal contact with the appellant;

(x) respondent was unemployed for a period of five months;

(xi) the respondent was upset by her dismissal, particularly because she was simply told that she was too expensive to retain and should find alternative employment while on maternity leave. This, she says, led to a breakdown in the working relationship with the appellant;

(xii) the respondent claimed that she no longer trusted the appellant;

(xiii) the respondent's husband involved himself in the dispute between the appellant and the respondent which led to acrimonious exchanges between the respondent's husband and the appellant;

(xiv) the respondent was subjectively of the view that she was dismissed for reasons relating to her pregnancy;

(xv) the respondent's allegation that she was dismissed because of her pregnancy was demonstrated to be untrue;

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[59] On a conspectus of all of the above fact and circumstances I am of the view that the Labour Court should have refused to make any

order in terms of s193(1)(c). The reason for this is that the LRA aims at striking a balance between the interests of the employers and employees alike. In terms of the LRA the primary means through which conflict between employers and employees should be resolved is through conciliation which is either voluntarily or via the machinery provided for by the LRA. In this matter every conciliatory approach made by the appellant by way of offering the respondent the maximum relief obtainable in terms of the LRA was rebuffed and no sound reason has been given for rejecting it. This action was contrary to the spirit and intent of the LRA.

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[60] Respondent's belief that the relationship had broken down and that she no longer trusted the appellant is not foreshadowed by any reasonable explanation why it was so. The respondent's claim that the manner in which she was dismissed led to the breakdown in the relationship is unconvincing. I do not accept that when an individual employer tells an employee that s/he is dismissing him/her because s/he is too expensive to retain in his/her employ that this will cause an employee such great trauma that s/he could not return to the employ of that employer, particularly where the employee is a professional and works independently of that employer or has minimal contact with the employer. In this matter

the respondent's evidence was that the appellant did not involve himself in the satellite practice that was run by her.

[61] While there was an acrimonious exchange between the appellant and the respondent's husband this cannot form a basis for a breakdown in the relationship between the respondent and the appellant, in any event, respondent did not rely hereon for the said breakdown. Insofar as the breakdown in the relationship may be related to the subjective belief by the respondent that she was being dismissed for reasons relating to her pregnancy, again, there is no basis for such belief. The Labour Court correctly did not find that the respondent was dismissed for reasons relating to her pregnancy as there was simply nothing to indicate this possibility. Indeed, it would be surprising for that to be the case as it would mean the appellant tolerated the respondent's pregnancy until she went on maternity leave in the ninth month of her pregnancy!

[62] In essence all we have from the respondent is her subjective belief that the relationship between the appellant and her had broken down. There is no support to the effect that her belief was a reasonable one. The mere *ipse dixit* that the relationship has broken down has never been sufficient for an employer to avoid

reinstating an employee, likewise it cannot be a sufficient basis for an employee to justify a rejection of a reasonable offer of reinstatement.

[63] In the circumstances I am of the view that in exercising its discretion on whether or not to grant the respondent the remedy she sought for her unfair dismissal the Labour Court should have had regard to what was fair to the respondent as well as what was fair to the appellant. While it would appear to be unfair not to grant an unfairly dismissed employee any remedy, especially where reinstatement or re-employment is not sought it cannot necessarily be so where reinstatement is offered by the employer and refused by the unfairly dismissed employee in circumstances such as in the present matter. The appeal must therefore succeed.

[64] With regard to the issue of costs the respondent has argued that because the appellant continued to defend this claim on the basis that the dismissal was fair or at the very least that the dismissal was only substantively fair, and persisted therewith until he filed his heads of argument in this Court, there should therefore be no order of costs either in the Court *a quo* or in this Court in the event of she not being successful. I agree. It is in the interest of equity that

costs should not follow the result either in the Labour Court or in this Court.

[65] In the result I make the following order:

(a) The appeal succeeds and the order of the Labour Court is set aside and replaced with the following order:

"(i) the dismissal of the applicant was both substantively and procedurally unfair;

(ii) no relief is granted in respect of the unfair dismissal;

(iii) there is no order as to costs."

(b) There is no order as to costs in the appeal.

WAGLAY JA

WILLIS JA:

[66] It is important that when respondent was cross-examined by counsel for the appellant, he elicited that the reason why the respondent had not accepted the appellant's offer of reinstatement was that her working relationship with the appellant had been totally destroyed and that she did not trust him anymore. That

evidence stands and the court may have regard to it.[1] That is one of the hazards of cross-examination.

[67] In my opinion, the court *a quo* made valid criticisms of the evidence of the appellant. In my opinion, the appellant may consider himself fortunate that the court *a quo* could not go so far as to find that the reason for her dismissal lay not merely in her pregnancy but also her impending status as a mother of a young child. No other reason suggests itself and this is especially so in the light of the court *a quo*'s finding (correctly, in my opinion) that the appellant had failed to prove that the dismissal was based on his operational requirements. Nevertheless, the failure to find that the reason for the dismissal was for reasons related to the respondent's pregnancy does not mean that she was not justified in believing that this was so. This has a bearing on the question of whether she may be criticised for not accepting the offer of reinstatement. In my opinion the court *a quo* was correct in finding that the respondent had been shocked by her dismissal, no longer had any trust in the appellant and justifiably believed that the employment relationship had broken down. The court *a quo* found that the respondent had acted "entirely reasonably" in refusing the

[1] See, for example, *R v Bosch* 1949 (1) SA 548 (A) at 553-554 and *De Klerk v Zagorie* 1943 EDL 44

appellant's offer of reinstatement. It may have been more correct to have said that the respondent did not act unreasonably in refusing the offer of reinstatement. Nevertheless, in my opinion, the court *a quo* cannot be criticised, in the light of the above, for deciding to award compensation in terms of section 193(1) (c) read together with section 193 (2)(a) of the LRA.

[68] When it came to the determination of the amount of compensation, however, the court *a quo* completely failed to apply its mind to the fact that the respondent had secured alternative employment at a better level of remuneration in September, 1998. Mr *Boda*, who appeared for the respondent, conceded that this amounted to a material misdirection on the facts which, in terms of the decision in, for example, *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs*[2] would justify interference by this court. Moreover, the court *a quo* failed to have regard to the important fact that the respondent was offered reinstatement. It is common cause that, as a result of her unfair dismissal, the respondent was "out of pocket" for four months' remuneration. Having regard to all the circumstances of the case, I would have intervened to set

[2] See, 2000 (2) SA 1 (CC) at para [11]

aside the order of compensation in the court *a quo* and would have substituted six months' pay as compensation.

[69] I agree with my brothers Zondo JP and Waglay JA, that this is a case in which the appropriate orders as to costs are that the parties are to bear their own costs both in the appeal and in the application before the court *a quo*.

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WILLIS JA

JUDGE OFAPPEAL

For the Appellant: Mr S. Snyman

Instructed by: Snyman Attorneys

For the respondent: Adv F.A. Boda

Instructed by: Phatsoane Henney INC

Date of the judgment: 26 March 2009