

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

CASE NO J2536/09

In the matter between:

BURGER, MARTIN MARIUS

Applicant

and

AETHER ENERGY CC

Respondent

JUDGMENT

TIP AJ:

1. This matter comes before me in default judgment proceedings pursuant to a statement of claim made under section 191(6) read with section 187 of the Labour Relations Act 66 of 1995 ("LRA"). The applicant contends that the termination of his services amounted to an automatically unfair dismissal in that it occurred in the context of a transfer as contemplated in section 197 of the LRA. The claim is unopposed. An affidavit of service of the claim on the respondent by prepaid registered post is on file.
2. The applicant gave evidence. He was previously employed at Vaal Reefs and during February 2009 was approached by Mr Gary Woolley, whom the applicant understood was the owner of the respondent, to come and work for it as a sales consultant for South Africa and areas of Africa. He accepted and took up that position from 1 April 2009 at a gross monthly

remuneration package of R53,800. Clause 1.1 of the contract of employment provides: *“This contract will begin on 1st April 2009 and continue until 1st April 2010 that will be renewably by the board on a yearly basis if set-performance mentioned here in are adhere too or exceed.”* [sic]

3. Clause 16.1 deals with performance and provides that sales contracts to the value of at least ten million rand should be concluded every three months. In respect of the remuneration package, clause 5 sets out that the basic wage would be R36,960 per month and that the balance would comprise allowance for transport, meals and accommodation when travelling, as well as cell phone usage for business calls. Mr Woolley said that the package had been structured in this way for tax reasons. Mr Burger testified that he had achieved the ten million rand target and that he had every expectation that his contract would have been renewed after the initial year. Indeed, Mr Woolley had said as much to him.
4. However, Mr Burger’s new position did not unfold smoothly. His salary for April and May were not paid. Mr Woolley told him that there were complications with finance. Then, on 15 June 2009, Mr Burger was handed a letter by Mr Woolley advising him that the respondent had been in negotiations and that a new BEE company called Lesdi Energy (Pty) Ltd had been formed which would come into operation on 17 June 2009. It was stated that all contracts and commitments that the respondent had made would be transferred to the new company. Seemingly, this would include Mr Burger’s contract of employment. The letter also noted that the outstanding salary for three months plus an extra three weeks, amounting in all to R161,400 would be paid out within the next two to four weeks. As it happened, none of that was paid out, but that does not form the subject matter of the present claim. It should be noted that the promised amount is based on the full monthly rate of R53,800.
5. The statement of claim states that Mr Burger’s services were terminated through the letter of 15 June 2009 but that appears not to be correct. In

any event, in his evidence, Mr Burger said that he continued to work into July 2009. There was a renewed promise from Mr Woolley about the payment of the remuneration but, again, nothing came of that. Mr Woolley also said that the directors of the new company had said that they did not require the services of Mr Burger and the other international sales consultants because, he went on, they had their own people. Mr Burger then left. Throughout these events, there had been no consultation whatsoever, whether in terms of section 189 or section 197 of the LRA.

6. Section 187(1)(g) is in these terms: “*A dismissal is automatically unfair ... if the reason for the dismissal is ... a transfer, or a reason related to a transfer, contemplated in section 197 ...*”. In this case, the facts clearly fall within the ambit of this provision. There was undoubtedly a transfer of the business of the respondent as a going concern. Equally plainly, the applicant’s employment came to an end because the directors of the new entity had their own staff to perform the work that the applicant had been doing – although the substantive viability of that view has not been factually demonstrated. Although the thus stated wishes of those directors evidently precipitated the termination of Mr Burger’s employment, the instrument thereof was Mr Woolley and on balance I am satisfied that he was thus acting on behalf of the respondent. In effect, Mr Burger was retrenched because of the transfer and without the semblance of any proper process.
7. The applicant testified as to the impact upon him of the loss of his employment. It has been severe. He has been unable to maintain bond repayments on the family home, which accordingly had to be disposed of. His car and furniture have suffered the same fate. Considerable stress has resulted not only for him, but also his wife and his daughter. The latter’s performance at school has dropped drastically. Psychological intervention is needed, but he has no funds for that. Although he has tried hard to secure new work, that has been unsuccessful and he resorts

to doing odd jobs if he can find them. He estimates that his losses stand at over R1,5 million.

8. In terms of section 194(3) of the LRA an award of compensation for an automatically unfair dismissal must be just and equitable in all the circumstances and not more than the equivalent of 24 months' remuneration. I have set out above the factors that tend to be of an aggravating nature, including the abruptness of the manner in which Mr Burger's employment was brought to an end and the entire absence of due process and regard to considerations of fairness.
9. Against that must be weighed the facts that his tenure as an employee had been relatively brief and that there was no certainty that it would have been extended beyond 1 April 2010. However strong Mr Burger's expectations might have been, it remained so that it would have been up to the board to make a decision whether or not to renew his contract at the appropriate time and various contingencies may have played a role at that stage.
10. Having regard to all these circumstances, it is my conclusion that an award should be made of 16 months' remuneration.

Order

11. Accordingly, I make the following order:
 - 1 It is declared that the applicant's dismissal was automatically unfair.
 - 2 It is declared that the applicant's dismissal was both substantively and procedurally unfair.
 - 3 The respondent is to pay compensation to the applicant in the amount equivalent to 16 months' remuneration, calculated at the full package rate of R53,800 per month.

- 4 The respondent is to pay the costs of this application.

K S TIP
ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING:	23 September 2010
DATE OF JUDGMENT:	1 October 2010
FOR APPLICANT:	Mr W P Schöltz of Jansens Incorporated