

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: J 361/98

In the matter between

MARIA DORETHEA DE BRUIN

Applicant

and

SUNNYSIDE LOCKSMITH SUPPLIERS (PTY) LTD

Respondent

JUDGMENT

VAN NIEKERK A J

Introduction

- 1 On 1 July 1997, during her lunch hour, Maria de Bruin, the Applicant in this matter, slipped and fell on the corner of Eloff and Harries Streets, Johannesburg. She broke her leg in two places. This event was to impact

profoundly not only on her health, but also on her employment. It is common cause that on 15 August 1997, while she was at home recovering from a series of operations undergone as a consequence of her accident, De Bruin received a letter from her employer advising her that during her absence from work it had been established that her position had become redundant. She was further advised that her services were accordingly no longer required, and she was given two weeks' notice of the company's intention to terminate her employment.

- 2 De Bruin claimed that her dismissal was unfair. In the absence of a successful conciliation by the CCMA, the dispute was referred to this Court for adjudication.
- 3 During the course of the proceedings, it was conceded on De Bruin's behalf that her dismissal was substantively fair. The only issue that remains in dispute therefore is whether De Bruin's dismissal was effected in accordance with a fair procedure as required by section 189 of the Labour Relations Act, 66 of 1995 and if not, the remedy to which she is entitled.

The facts

- 4 The Company is engaged in the distribution of locks, keyblanks and locksmith tools. It is a small business. It is also in dire financial straits. The undisputed evidence of Mr. Gerald Mindel, the Managing Director, was that during 1997 the Company's financial position began to deteriorate, and that the Company is currently struggling to survive. It was also undisputed that during the course of last year, Mindel had taken a pay cut of 50%, that other monthly paid employees had taken a pay cut of 20%, and weekly paid employees a cut of 10%.
- 5 It is also common cause that the company employed De Bruin on 8 February 1995. At the time of her dismissal therefore, she had been employed for some 30 months. She was initially engaged to conduct telesales on a half-day basis. At the time of her accident, she was engaged on what was termed the "front desk", on a full day basis. At that stage, she earned R3 300,00 per month.
- 6 It is common cause that immediately after her accident on 1 July 1997, De Bruin was admitted to hospital, and that she underwent an operation on 2 July 1997.
- 7 De Bruin testified that on 3 July 1997, she telephoned the receptionist, Ms Leona Jordaan, to advise her of her condition. De Bruin says that she

requested Jordaan to tell Mindel that she had been hospitalised.

8 At some stage before 20 July 1997, De Bruin says that she telephoned Mindel on his cell phone, and that Mrs. Mindel answered. De Bruin says that they had a conversation about Mindel's state of health (she had heard that he was ill) and her own. She says that she advised Mrs. Mindel of the fact that she was about to undergo a second operation, and that she requested Mrs. Mindel to advise Mindel that she had telephoned. Mrs. Mindel gave evidence for the Company. She denied that the conversation took place.

9 De Bruin underwent a second operation on 20 July 1997. During the latter half of July, while she was recuperating at home, De Bruin says that she had further contact with the office in the form of work brought to her by the company driver. The work comprised the alphabetical filing of invoices, which De Bruin says that she did at home. This is disputed by Zizi Landolt, the Company's bookkeeper, who testified that it was not policy to permit documents to leave the company's premises.

10 Mindel testified that in early August 1997, he became concerned about

De Bruin's continued absence from work. He had received no reports of her condition beyond the initial report of her accident, and a report that she had been discharged from hospital. He said that on 6 August 1997, he requested Landolt to address a letter to De Bruin.

11 Landolt gave evidence that she typed and signed the letter on 6 August and that she instructed the company driver to deliver it to De Bruin's home.

The letter reads as follows:

"Dear Maria,

It has been well over a month since we have had any word from you. Please let us know if you are returning to work and if so when we can expect your return as we are unable to keep your position open indefinitely.

*Kind regards
Zizi Landolt."*

12 Mindel gave evidence to the effect that during De Bruin's absence, he had observed that other employees were sufficiently capable of doing the work normally undertaken by her. His purpose in instructing Landolt to address the letter to De Bruin was twofold. First, he wished to establish whether she intended returning to work, and secondly, he wished to convey to her that the security of her employment was in some doubt. He stated that he was aware of an obligation to negotiate prior to retrenching an employee

and in his view, the letter had served to initiate a discussion with her. He conceded that the letter was unfortunately worded, and that it did not convey his intention as precisely as it could have.

13 There is some doubt as to whether the letter was delivered on 6 or 7 August 1997, but that is not particularly material for present purposes. De Bruin testified that she received the letter of 6 August 1997. She was sufficiently shocked after reading the letter to request her husband to take her, in a wheel chair, to the nearest public telephone. She says that she spoke to Landolt and asked her why she had sent the letter. According to De Bruin, Landolt replied that she (De Bruin) was wasting the company's time and that she had nothing further to say.

14 De Bruin testified that she was upset at the content and tone of the letter, and at Landolt's response. As far as she was concerned, she had kept the company advised of her condition. She requested her husband to go to the company's premises to see Landolt on her behalf.

15 What transpired between Mr. de Bruin and Landolt is disputed. Mr. de Bruin testified that early on the morning of 6 August, he reported at the Traffic Department where he worked, and then caught a bus to the Brenthust Clinic where he obtained a medical certificate before catching a

bus home. His evidence was that he and his wife had decided the previous day to obtain a further medical certificate from the medical practitioner attending to De Bruin. After his arrival at home, the letter signed by Landolt was delivered. After the telephone call was made by his wife and their agreement that he would intervene on her behalf, he again caught a bus into the city to go and see Landolt, which he did shortly after 08:00.

16 When he arrived at the company's office, he asked to speak to Landolt. He says that he advised her that De Bruin had notified the company of her condition, and that the letter was unfair. He testified that Landolt then started swearing at him, and that he advised her that the company could not treat De Bruin the way it had. He left the medical certificate with Landolt and left the premises.

17 Landolt's version of her encounter with Mr. de Bruin is very different. She testified that on the morning of 7 August 1997 Mr. de Bruin arrived at the company's premises, in uniform, and in an abusive and threatening way, told her that he and his wife had taken advice, that they would sue the company and that were it not for the fact that she was a woman, he would have "sorted her out". Landolt says that Mr. de Bruin's conduct was such that she requested two colleagues to escort Mr. de Bruin from the premises, which they did. She reported the matter to Mindel, who was in

Durban at the time of the incident, and to the Traffic Department, Mr. de Bruin's employer.

18 Mindel testified that on his return to the office on Monday 11 August 1997, he received a report from Landolt regarding Mr. de Bruin's visit, and that he was particularly concerned by what he heard. He formed the view that in the circumstances, and in the light of previous encounters with Mr. de Bruin, he could not continue to deal with De Bruin, and that there was no merit in any further discussion with her on the matter of her employment. He therefore abandoned his intention, conveyed in the letter of 6 August, of a discussion with De Bruin, and decided to terminate her employment. After advice was sought from the Department of Labour, he gave instructions for a letter to be addressed to De Bruin. The letter reads as follows :

"Dear Maria

I was away last week when your husband came into the office in response to a letter that Zizi Landolt had sent to you at my request.

I understand that your husband was extremely abusive to Zizi and threatened her with physical reprisals and had to be forcibly restrained and removed from our premises by members of staff.

I further understand that complaints concerning your husbands actions have been registered both with the Johannesburg Traffic Department and the Department of Manpower.

You have been away from work for almost 6 weeks now and we have discovered that your position in the firm has become irrelevant. We have, therefore, decided to do away with the position you previously occupied and that your services will no longer be required.

We are, therefore, giving you two weeks notice effective today.

We are enclosing a cheque in the sum of R3 466,98 made up as follows :

<i>2 weeks notice pay @ R761,54/week</i>	<i>R1523,08</i>
<i>7.5 days leave pay @ R152,31/day</i>	<i>R1142,33</i>
<i>5 weeks pay as compensation for your retrenchment</i>	<i>R3807,70</i>

R6473,11

less overpaid on sick leave due 13 days

R1980,03

less PAYE

R1026,10

Total payment due : R3466,98

We are sorry that this situation has arisen and we wish you a speedy recovery."

19 De Bruin testified that on 15 August 1997 she was at home in bed, when a representative employed by the company delivered the above letter.

Findings

20 In regard to the disputes concerning communication between De Bruin and the Company, I accept that De Bruin was of the view that she had

discharged any obligation she had to notify the Company of her injury and consequent incapacity. I accept too Mindel's evidence that no medical certificates relating to the seriousness of De Bruin's injury or her prognosis were ever brought to his attention. It is probable that De Bruin placed her faith in Jordaan as a conduit to senior management but that for some reason, reports of De Bruin's circumstances were never communicated to Mindel.

21 Little turns on the matter of the communications between De Bruin and the Mindels, or on the dispute about the frequency with which these communication were made, or with which medical certificates were furnished. The only factual dispute of any consequence relates to events surrounding Mr. de Bruin's visit to the Company's premises after delivery of the letter dated 6 August 1997. In this regard, I accept Landolt's version of events. Mr. de Bruin was not a satisfactory witness. He was clearly confused about the dates and times of events that culminated in the altercation between him and Landolt. His version of events that he says took place on the early morning of 6 August is improbable. He conceded as much during cross-examination. The crux of this dispute is the effect, if any, of the altercation on the company's obligations in terms of section 189 of the LRA. In this regard, Mindel's evidence is crucial. On his own evidence, he had reached a conclusion that went beyond the point of

contemplation of dismissal when he directed Landolt to address the letter of 6 August 1997. He also failed to consult on any of the matters referred to above.

22 Section 189 requires an employer that contemplates terminating the employment of one or more of its employees for reasons relating to its operational requirements, to consult the appropriate parties in an attempt to reach consensus on measures to avoid the dismissals to minimise them, to change the timing of the dismissals and to mitigate their adverse effect. Consultation is also required on the methods for selecting those employees whose employment is to be terminated, and on the severance pay that will be paid to them.

23 The Company's defence is that given the events surrounding the altercation between Landolt and Mr. de Bruin, the Company should be excused from any failure to comply with the requirements of section 189.

24 Mr. Landman, who appeared for the company, submitted that Mindel was reasonably entitled to assume that any further dealings with either of the De Bruins would have been fruitless, and that Mindel was entitled in those circumstances to terminate De Bruin's employment in the manner he

did.

25 The Labour Appeal Court recently affirmed the principled and pragmatic rationale for the need to consult before a final decision on retrenchment is taken. (See *S A Clothing & Textile Workers Union & Others v Discreto - A division of Trump & Springbok Holdings* (1998) 19 ILJ 1451 at 154 E to H.

26 It is now well established that section 189 places some primary obligations on an employer in order to ensure that an employee is not unfairly dismissed. These have as their principal purpose a joint consensus-seeking approach. On this basis, a mechanical approach to section 189 has been held to be inappropriate, the correct approach is to ascertain whether the purpose of the section has been achieved. If the purpose has not been achieved, the reason must be established and the Court must determine whether there is any fault to be attributed to the parties. (see *Johnson and Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR 1209 (LAC), at 1216). The starting point, however, is section 189. The Labour Appeal Court has observed that the provisions of that section are inextricably linked to the fairness of a dismissal for operational requirements, and that a finding of non-compliance will invariably result in the dismissal being unfair for want of compliance with a proper procedure. Mindel was an impressive witness. I accept that subjectively, he considered that further

dealings with the De Bruins would have been fruitless. But the test of compliance with section 189 is not subjective. Mr. Rossouw argued, correctly in my view, that Mindel could have continued the process of consultation and ensured compliance with section 189 by telephone, or by correspondence, if a meeting was impossible or inappropriate on account of the strained relationship that had been created by Mr. de Bruin's intervention. He failed to do so. I have no hesitation in concluding that the Company dismissed De Bruin without following a fair procedure.

Compensation

27 The final issue that remains to be determined is an appropriate remedy.

De Bruin has elected to waive the primary remedies of reinstatement and re-employment. She seeks an award of compensation. The principles regulating an award of compensation are discussed in the *Johnson and Johnson* judgment.

28 The starting point is section 194 of the LRA. That section provides:

"(1) If a dismissal is unfair only because the employer did not follow a fair procedure, compensation must be equal to the remuneration that the employee would have been paid between the date of dismissal and the last day of the hearing of the arbitration or the adjudication, as the case may be, calculated at the employee's rate of remuneration on the date of dismissal. Compensation may however not be awarded in respect of any unreasonable period of delay that was caused by the employee in initiating or prosecuting a claim.

(2) The compensation awarded to an employee whose dismissal is found to be unfair because the employer did not prove that the reason for dismissal was a fair reason related to the employee's conduct, capacity or based on the employer's operational requirements, must be just and equitable in all the circumstances, but not less than the amount specified in subsection (1), and not more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.

(3) The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.

29 The rigidities in section 194 have been the subject of criticism by this

Court. In *Chantel Annie du Toit v Sasko (Pty) Ltd* (Case No. J1115/97)

Mlambo J stated-

"He (referring to the legal representative for the respondent) has further argued that the interpretation presently accorded to this section by the LAC leads to absurd and repugnant consequences. This argument commends itself to me especially the fact that the size of the compensation awarded depends on how long it takes the adjudicative and arbitral process to finalise the matter. The case load of the relevant forum determines the amount awarded at the end of the day. This appears to have, at least for employers, absurd consequences. In my view this result cannot be ruled out entirely and it is perhaps advisable that this issue be revisited by our betters in the Labour Appeal Court."

30 In *Vickers v Aquahydro Projects* (case number D424/97) Maserumule AJ stated

"Sections 194(1) and (2) obviously require amendment to remove the apparent ambiguity. Until this is done, the Court is required to interpret the Act in a manner consistent with its purpose".

31 The provisions of section 194 were drafted with some obvious assumptions about the expeditiousness of the new statutory dispute resolution mechanisms in mind. This much is obvious from the Explanatory Memorandum published with the Draft Bill. (See 1995 ILJ 278 at 320, where it is envisaged that disputes would be resolved within weeks; a fundamental assumption made in regard to the statutory formula for compensation in procedurally unfair dismissals). In the *Vickers* case, Maserumule AJ went on to hold that it was not the legislature's intention to afford an employee whose dismissal is unfair only because of unfair procedure more compensation than an employee whose dismissal was without a valid reason. On this basis, he concluded that the limit of 12 months compensation in section 194(2) applies equally to compensation payable in terms of subsection (2). In the *Whall v Brandadd Marketing (Pty) Ltd* case, the same approach was adopted. Although De Bruin was dismissed almost 18 months prior to the last day of the hearing of this matter, on the basis of the above authorities, the maximum compensation

to which De Bruin is entitled is the equivalent of 12 months remuneration. I did not understand either counsel to dispute this interpretation of section 194(1).

32 Having determined the maximum to which De Bruin is entitled, it remains to consider whether the Court has any discretion to order any lesser amount. In the *Johnson & Johnson* decision, the Labour Appeal Court summarised the position as follows:

" If a dismissal is found to be unfair solely for want of compliance with a proper procedure the Labour Court, or an arbitrator appointed under the LRA, thus has a discretion whether to award compensation or not. If compensation is awarded it must be in accordance with the formula set out in s.194(1); nothing more, nothing less. The discretion not to award compensation in particular cases must, of course, be exercised judicially."

33 The Labour Appeal Court provides at least two examples of what might constitute a basis for a refusal to grant compensation. At 1220D of the report the Court adds that:

"The nature of an employee's right to compensation under s.194(1) also implies that the discretion not to award that compensation may be exercised in circumstances where the employer has already provided the employee with substantially the same kind of redress (always taking into account the provisions of s.194 (1)), or where the employer's ability and

willingness to make that redress is frustrated by the conduct of the employee.”

In the *Brandadd Marketing* case, Grogan AJ applied the approach adopted in the *Johnson and Johnson* case, but considered a number of other factors that may be relevant to the exercise of a discretion to refuse an award of compensation, utilising as a point of departure a comparison between the statutory minimum and the amount that the applicants would have received in the absence of a statutory constraint. In this instance, in the absence of the constraints imposed by section 194(1), the approach that would have been adopted is that applied by the Labour Appeal Court in *S A Clothing & Textile Workers Union & Others v Discreto - A Division of Trump & Springbok Holdings* (1998) 19 ILJ 1451 (LAC). In that case the Court considered that the "practical (and flexible) yardstick" to determine the appropriate amount of compensation would be the employee's salary for the length of time a normal process of consultation would have taken. Having regard to the size of the Company and the nature of its business and the fact that the Company was obliged only to consult with a single employee, it is fair to assume that a process of consultation in compliance with section 189 would have taken a month or so to complete.

amounts paid to her. Included in these is an amount of R3807,00, described in the letter as "*compensation for your retrenchment*". During argument, Mr. Rossouw agreed that this amount constituted compensation in the form envisaged by section 194, and not severance pay payable in terms of section 196, and that it could therefore be taken into account for the purposes of calculating any compensation to which De Bruin may be entitled.

35 I am of the view that the degree of unfairness in relation to the Company's conduct is not such that an award of the equivalent of 12 months remuneration is warranted. The company has paid an amount equivalent to 5 weeks remuneration in compensation, and that in my view is a fair and adequate sum to compensate De Bruin in the circumstances of this case. In the words of the formula in *Johnson & Johnson*, sufficient redress has already been made. Furthermore, the process of consultation was to some extent frustrated by the Applicant. Although this was insufficient to warrant a finding that De Bruin's dismissal was procedurally fair, I am entitled to take into account for the purpose of exercising a discretion concerning compensation the fact that Mr. de Bruin, who was authorised to act and who acted on De Bruin's behalf, conducted himself in a manner that was not conducive to constructive consultation. A degree of blame can therefore be attributed to the Applicant for the failure of the consultation

process, and for the failure of the purpose underlying section 189. In all the circumstances, I exercise the discretion conferred on me by section 194(1) not to award compensation to De Bruin.

Severance pay

36 Section 196(1) requires an employer to pay an employee dismissed for reasons based on the employer's operational requirements severance pay equal to at least one week's remuneration for each completed year of service with that employer. It is common cause that De Bruin was not paid severance pay at the time of her dismissal. She is therefore entitled to the equivalent of two weeks' remuneration.

Costs

37 This is not a case where an ongoing relationship should deprive a successful party of costs. De Bruin has succeeded in establishing that her dismissal was procedurally unfair, and I see no reason to deprive her of her costs. I would note however that her representative until the commencement of the proceedings was the Sebenza Labour Consultancy. Labour consultants have no right of appearance in this court and are not entitled to recover costs. Mr.

Rossouw, who trades as Sebenza Labour Consultancy, appeared in these proceedings in his capacity as an advocate of the High Court. He satisfied the Court that he was instructed to appear in that capacity. The attorney who instructed Mr. Rossouw appeared to play no part in the proceedings beyond signing the brief cover. In these circumstances, and I did not understand Mr. Rossouw to disagree, the costs to which De Bruin is entitled are limited to the costs of appearance by counsel for the two days of the hearing.

38 I accordingly make the following order :

38.1 The dismissal of the Applicant was procedurally unfair.

38.2. The Respondent is ordered to pay the Applicant's severance pay in an amount equivalent to two weeks' remuneration, to be calculated on the basis of the remuneration paid to her on the date of her dismissal, i.e. R3 300,00 per month.

38.3. The Respondent is ordered to pay the Applicant's costs, such costs to be limited to the fees of an appearance in trial proceedings by one advocate, for two days, on a party and party basis.

ANDRE VAN NIEKERK

Acting Judge of the Labour Court

SIGNED AT JOHANNESBURG AND DATED ON THIS THE 19TH DAY
OF APRIL 1999

DATE OF HEARING 18 & 19 February 1999

DATE OF JUDGMENT 19 April 1999

For the Applicant: Advocate J Rossouw instructed by Neels
Engelbrecht Attorneys

Respondent Advocate A Landman instructed by Kassel Sklaar Cohen