IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO.: JA 35/06

In the matter between:

BUSINESS AND DESIGN SOFTWARE
(PTY) LIMITED **1ST APPELLANT**

NATIONAL GOLF NETWORK
(PTY) LIMITED **2ND APPELLANT**

and

ERIC VAN DER VELDE **RESPONDENT**

JUDGMENT

ZONDO JP et JAPPIE JA

Introduction

[1] This is an appeal from a judgment of Van Niekerk AJ sitting in the Labour Court. The respondent was dismissed from his employment as general manager at the end of March 2003. He referred a dispute concerning the fairness of his dismissal to the Commission for Conciliation Mediation and Arbitration ("**the CCMA**") for conciliation. When the dispute was unresolved, it was referred to the Labour Court for adjudication. The Labour Court had to decide whether the respondent was dismissed for a reason that rendered the dismissal automatically unfair as

provided for in section 187 (1) (g) of the Labour Relations Act 66 of 1995 (the LRA or the Act). Sec 187(1)(g) of the Act is to the effect that a dismissal for a transfer of a business as a going concern or a reason connected with the transfer of a business as a going concern is automatically unfair.

Background

[2] The material facts are largely common cause. The respondent commenced employment with the first appellant, Business and Design Software (Pty) Limited, as its general manager in March 1999. At the time Mr Nico Spence ("**Spence**") was the first appellant's managing director. In April 2001 Spence sold the business to AST Group Limited. Spence continued as managing director until his resignation in April 2002. Spence recommended that the respondent replace him as the first appellant's managing director. However, the Deputy Chief Executive Officer of AST Group Limited, Mr Martinus Erasmus, appointed a Mr Paul Smulders ("**Smulders**") as the managing director of the first appellant in June 2002.

[3] In September 2002 Smulders advised the respondent that AST Group Ltd was concerned that the management structure of the first appellant was '**top heavy**' and that the respondent was regarded as '**surplus to requirements**'. Nothing more, however, came of this. At that stage the first appellant was experiencing structural difficulties and Smulders had recommended that the first appellant restructure its management structure. However, the first appellant did not proceed with that restructuring at this stage.

[4] At the end of 2002 and as part of a process of consolidation, AST Group Ltd as owners of the first appellant sought to dispose of all its '**non-core**' businesses. The business of the first appellant was regarded as a '**non-core**' business.

[5] During or about January 2003 Smulders initiated a management buy-out of the first appellant's business from the AST Group. When this came to the knowledge of the respondent, he, too, sought permission to bid for the business of the first appellant. Such permission was granted and the respondent put his bid in. On Monday, 24 February 2003, the respondent was advised that Smulders had been successful in his bid and that AST Group Ltd intended selling the business of the first appellant to National Golf Network (Pty) Limited, the second appellant.

[6] At the end of February 2003 Smulders brought his brother, Marcelle Smulders, into the business. The appointment of Marcelle Smulders raised the issue of the respondent's role in the business of the first appellant. At a meeting held on 3 March 2003 Marcelle Smulders advised the respondent that he, that is the respondent, had three options. These were that the respondent could resign from the first appellant and possibly be offered what was then the business systems division of the first appellant or he could stay on at the first appellant and face disciplinary action or, alternatively, he could accept voluntary retrenchment. It is not clear what the basis for disciplinary action was going to be. Subsequent to this meeting, the respondent addressed a '**without prejudice**' letter to Smulders and to AST Group Ltd. The "**without prejudice letter**" has been referred to by the parties in this litigation without any objection from either party that it ought not have

been referred to. In the letter the respondent proposed that he be retrenched on certain terms and conditions.

[7] On 7 March 2003, Smulders, acting on behalf of the first appellant, addressed a letter to the respondent offering him alternative employment with the first appellant as its Administration Manager at a reduced salary. The respondent was to report to and assist the various line managers. This letter further advised the respondent to limit his discussions with staff members who had earlier resigned from the first appellant. It also warned the respondent to '**ensure that all your client responsibilities are handed over to me immediately**'. Finally, the letter concluded by stating that it served as a formal warning that '**failure to rectify the situation will force management to review your position in BDS [the first appellant]**'. On the same day, namely, the 7th March 2003, the respondent was moved from his office into the general work area and Marcelle Smulders began to occupy the respondent's office.

[8] On 11 March 2003 the respondent received an e-mail from Mr Steve Strydom who was the Head of Human Resources at AST Group Ltd. In the e-mail Stydom rejected the respondent's proposal that he be retrenched on certain terms. Strydom noted that '**the skills you have and the role that you currently perform make you a valuable employee to AST, BDS and therefore I do not envisage that you will be considered for voluntary retrenchment. Voluntary retrenchment is a management decision**'.

[9] On 26 March 2003 a meeting was held between the respondent, on the one hand, and, Strydom, Paul and Marcelle Smulders, on the other. The respondent was told that the business was being restructured and that the

position of General Manager was no longer going to be available from 1 April 2003. The respondent was then told that, if he did not accept the position of Administration Manager, he would be retrenched.

[10] On Friday, 28 March 2003 a further meeting was held between Paul Smulders and the respondent and he was again advised that, if he did not accept the position of Administration Manager, he would be retrenched. The respondent replied that he was not willing to accept the position of Administration Manager. His reasons for his refusal were that the remuneration offered for that position was inadequate, that he would be required to report to persons who had previously reported to him and that the position was not one in which he felt that he could fully utilise his skills. The respondent was then informed that he was being dismissed and that he should collect his payslip on Monday 31 March 2003. The respondent was dismissed with effect from 31st March 2003.

[11] On the 3rd April 2003 the first and second appellants concluded and signed a sale agreement in terms of which the first appellant sold its business to the second appellant as a going concern. The transaction was described as '**a friendly internal acquisition**'. Clause 16 of the agreement provided that the employees listed in the schedule annexed to the agreement would be employed by the second appellant in terms of section 197 of the LRA. Their employment would be on the same terms and conditions, including, remuneration and other benefits, as those upon which they had been employed by the first appellant immediately prior to the '**effective date**'. The agreement recorded that the effective date of the transaction, notwithstanding the date upon which the agreement was signed, was the 1st January 2003. The respondent's name appeared in the schedule of employees who the agreement said would be employed by

the second appellant. All risks and benefits attaching to the business of the first appellant would be deemed to have passed to the second appellant on the effective date. Ownership of the business was deemed to have passed to the second appellant on the effective date provided certain suspensive conditions were fulfilled. It is common cause that all suspensive conditions were fulfilled on or by the 3rd April 2003.

THE LABOUR COURT

[12] A dispute arose between the appellants and the respondent about the fairness of the respondent's dismissal. In due course the respondent referred the dispute to the Labour Court for adjudication. The Labour Court had to decide whether the dismissal of the respondent was automatically unfair in that it was for a reason provided for in section 187 (1) (g) of the LRA. That is to say a dismissal that is based on the transfer of a business as a going concern as contemplated in section 197 or 197 (A) of the LRA or for a reason related to such a transfer.

[13] At the commencement of the proceedings before the Labour Court, the first appellant contended that it ought not to have been cited in the proceedings as the respondent was not dismissed by it but by the second appellant. The basis for this contention was that the dismissal of the respondent occurred three months after the '**effective date**' (1 January 2003) of the sale of the first appellant's business to the second appellant. That is to say, at the date of the respondent's dismissal – 31 March 2003, the business was '**effectively**' owned by the second appellant in terms of the sale agreement. However, it must be pointed out that it is common cause that as at the date of the respondent's dismissal the sale agreement had not yet been signed and that the only reason why the first appellant argued that its business was owned by the second appellant as at that date

was because, when, subsequently, the first and second appellants signed the sale agreement on 3 April 2003, they fixed the effective date of the agreement as 1 January 2003 and not the 3rd April when they signed it.

[14] The Labour Court held that the '**effective date**' stipulated in the agreement was not binding on the respondent. It held that the transfer of the business for the purposes of section 197 of the LRA took place when the sale became unconditional on 4 April 2003. The Court a quo held that it followed that, when the respondent was dismissed at the end of March 2003, he was in the employ of the first appellant and that the first appellant had dismissed him prior to the transfer of the business to the second appellant.

[15] In a very thorough judgment the Labour Court held that, when an employee claims that a dismissal is automatically unfair because the reason for the dismissal is a transfer of a business as contemplated by section 197 of the LRA or is a reason related to such a transfer, the employee bears the evidential onus to show the existence of the dismissal and must show that the underlying transaction is one that falls within section 197 of the LRA. It said that this is an objective inquiry and all relevant facts and circumstances must be considered. It further stated that the proximity of the dismissal to the date of the transfer may be a relevant but not the determinative factor in this preliminary enquiry.

[16] The Labour Court held that, if an employee succeeds in discharging the evidential burden to prove dismissal, it is for the employer to show that the reason for the dismissal is a reason that is not related to the transfer of the business as a going concern.

[17] The Labour Court found that the respondent had shown that he had been dismissed by the first appellant and that the transaction in terms of which the business of the first appellant was acquired by the second appellant fell within the ambit of section 197 of the LRA. The Labour Court came to the conclusion that the respondent had adduced sufficient evidence to establish on a balance of probabilities that his dismissal and the transfer of the first appellant's business were causally linked. The Labour Court pointed out that the respondent had been dismissed less than a week before the completion of the transaction that gave rise to the transfer of the business. At the time of the respondent's dismissal, the second appellant was making the necessary preparations to assume full ownership and control of the first appellant's business.

[18] With the Labour Court having come to the aforesaid conclusion, it was now for the appellants to show that the reason for the respondent's dismissal was not the transfer of the business or a reason related to the transfer. Before the Labour Court the appellants contended that the true reason for the respondent's dismissal was the first appellant's operational requirements or reasons that are related to the second appellant's operational requirements.

[19] After considering the contentions raised by the appellants, the Labour Court concluded that the appellants had failed to discharge the onus of establishing that the respondent was dismissed for a reason that was not related to the transfer of the business from the first appellant to the second appellant. The Labour Court stated the following:-

> "**If the applicant was indeed redundant to NGN, and the intention was to replace him with one or more other employees,**

to have dismissed the applicant days prior to the transfer seem to me, in the absence of additional factors on a balance of probabilities, an automatically unfair dismissal."

The Court accordingly concluded that the respondent's dismissal was hit by the provisions of sec 187(1)(g) of the LRA and was, therefore, automatically unfair.

[20] As the respondent did not seek reinstatement, the Labour Court awarded him compensation in an amount equivalent to 12 months remuneration and the appellants were ordered to pay the costs of the action. The appellants applied for leave to appeal to this Court against the order of the Labour Court. The Labour Court granted the appellants leave to appeal to this Court.

The appeal:

[21] Before us Counsel for the appellant submitted that the C*ourt a quo* erred in concluding that the respondent had been dismissed prior to the transfer of the business. He submitted that in so doing, the *Court a quo* had completely negated the clear terms of the sale agreement between the first and second appellants and had ignored the evidence relating to when the effective control of the business passed to the second appellant. He further submitted that the transfer of the business from the first appellant to the second appellant was regulated and determined by the provisions of the written agreement of sale between the first and second appellants in terms of which the effective date of the agreement was defined as 1 January 2003 notwithstanding the fact that the date of the signing of the agreement was 4 April 2003. Counsel for the appellant submitted that the following points should be borne in mind:

(i) the business was sold as a going concern as one indivisible transaction with effect from the effective date.

(ii) all risks and benefits attaching to the business were deemed in terms of the sale agreement to have passed to the purchaser from the effective date.

(iii) from the effective date the purchaser enjoyed all rights and had all the obligations provided for in the agreement.

(iv) with effect from the effective date the purchaser would, in terms of section 197 of the LRA, take over the employment of all the employees employed in the first appellant's business on the same terms and conditions of employment as those which had previously governed their employment by the first appellant.

(v) the interim period is defined in the sale agreement as the period between the effective date and the delivery date, including the first mentioned date and excluding the last mentioned date.

[22] The appellant's attorney submitted that, although the purchase and sale agreement was perfected on the 4th April 2003 when all the suspensive conditions were fulfilled, the terms of the contract were such that the second appellant took transfer of the business, took delivery of the assets, employed the employees, and accepted all risks, income and liabilities from the first appellant with effect from 1 January 2003. The appellants' argument concluded with the submission that, in the light of the above, the proper finding that the Court a quo ought to have made was that the

respondent was in the employ of the second appellant when he was dismissed with effect from 31 March 2003. It was submitted that to conclude otherwise, as the Court a quo did, would be to ignore the principles of the common law and to misinterpret the provisions of section 197 of the LRA.

[23] the provisions of 197 (1) and (2) of the LRA provide:-

"**(1) In this section and in section 197A –**

"business" includes the whole or a part of any business, trade, undertaking or service; and

"transfer" means the transfer of a business by one employer ("the old employer") to another employer ("the new employer") as a going concern

(2) If a transfer of a business takes place, unless otherwise agreed in terms of sub-section (6) –

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(b) all the rights and obligations between the old employer and an employee at the date of transfer continue in force as if they had been rights and obligations between the new employer and the employee;

(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer;

(d) **the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.**"

[24] As indicated above, the first appellant's argument is that, because it and the second appellant agreed that the effective date of the transfer of business was 1 January 2003, that is the date with effect from which the respondent's contract of employment with it was automatically transferred to the second appellant. This argument was presented to ensure that the first appellant escaped liability for the dismissal of the first respondent because then the respondent would in law have been dismissed by the second appellant from its employ with effect from the 31st March. If the argument is rejected and it is held that the transfer of the contracts of employment occurred when the business was actually transferred as opposed to when it was deemed by the parties to have been transferred, the respondent would have been in the first appellant's employ when he was dismissed.

[25] It seems to me that, when sec 197(2) says **"(i)f a transfer of a business takes place …**" it refers to the actual time when the transfer of a business takes place and not to a time when the transfer is in terms of the agreement of sale between the seller of the business and the buyer of the business deemed to have taken place. In terms of the Act the transfer of contracts of employment of employees takes place when the transfer of a business actually takes place. The transfer of a business is a question of fact. However, the transfer of the contracts of employment, which occurs upon the transfer of a business as a going concern, is a question of law. The former occurs as a matter of fact whereas the latter occurs by

operation of law. Therefore, when section 197(2)(a) says that **"(i)f a transfer of a business takes place, unless otherwise agreed in terms of sub-section (6)-**

> **(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;"**

it does not refer to a time that the parties agree to deem to be the time when the transfer of the business took place when that time is not in fact the actual time when the transfer of the business took place. There is nothing in the statute to suggest that the date of the transfer of the business for purposes of the Act can be a date other than the date when the transfer actually happens. If the seller and the buyer agree to deem a date other than the actual date of the transfer of the business to be the date of the transfer of the business, that is an arrangement between them which does not bind third parties. The Act is to the effect that when a business is transferred as a going concern from one entity to another, by operation of law the contracts of employment of employees of the seller are automatically transferred into the employ of the buyer unless it is otherwise agreed with the employees or their representatives.

[26] In the light of the above we conclude that the first appellant's contention that the date of transfer of the respondent's contract of employment- assuming that there was such a transfer from the first appellant's employment to that of the second appellant - was the 1st of January 2003 falls to be rejected. In these circumstances the finding of the Court a quo on this point must be upheld.

[27] The next issue that needs consideration in this matter is whether or not it can be said that the reason for the respondent's dismissal was "**the transfer or a reason related to the transfer contemplated in section 197 or section 197A**"of the Act. The relevance of this question lies in the fact that the respondent's case that his dismissal was automatically unfair is based on section 187(1)(g) of the Act. That provision is to the effect that a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 of the Act or if the reason for the dismissal is the transfer of the employer's business as a going concern or is reason related to such a transfer. The question that arises therefore is whether the reason for the respondent's dismissal was the transfer of the first appellant's business to the second appellant or a reason related to such transfer or not. We turn to that question.

Was the reason for the respondent's dismissal the transfer of the first appellant's business to the second appellant or a reason related to such transfer?

[28] Sec 187(1)(g) of the LRA provides:

> "**A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is a transfer or a reason related to a transfer, contemplated in section 197 or section 197A."**

The effect of the latter part of sec 187(1)(g) of the LRA is that, if the reason for a dismissal is the transfer of a business or a reason related to such transfer, the dismissal is automatically unfair. In this matter it was argued on behalf of the respondent that the reason for the respondent's dismissal was the transfer of the first appellant's business to the second appellant or, at least, that it was a reason related to such transfer of

business. It is, therefore, necessary to consider whether that contention is supported by the evidence.

[29] There is direct evidence that the reason for the respondent's dismissal was either the transfer of the first appellant's business to the second appellant or a reason related to such transfer. However, before we refer to that evidence, it may be important to point out that the sequence of events leading to the respondent's dismissal and the effecting of the transfer of the first appellant's business to the second appellant soon after the respondent's dismissal also points very strongly to the reason for the respondent's dismissal being either the transfer or a reason related to the transfer. In this regard the following can be highlighted:

(a) at the end of February 2003, Mr Paul Smulders brought his brother, Mr Marcelle Smulders, into the business. Of course this appointment raised the issue of the respondent's role in the business.

(b) on the 3rd March 2003, Marcelle Smulders advised the respondent that the latter had three options. He could resign from the first appellant; he could stay on and face disciplinary action or he could be retrenched.

(c) on the 7th March 2003 the respondent was moved out of his office and that office was given to Mr Marcelle Smulders to use.

(d) on the 11th March 2003, the respondent was informed via e-mail from Steve Strydom that he was regarded as being indispensable to the business and could not possibly be considered for retrenchment. However, on the 31st March 2003 his employment was terminated.

(e) as at the 28th March 2003 the transfer of the business from the first appellant to the second appellant was imminent.

(f) the respondent was dismissed with effect from a date that was only three days away from the date of the transfer of the business.

(g) the respondent was dismissed for operational requirements notwithstanding that only about two or three weeks previously Mr Strydom had said that the respondent was crucial to the first appellant's business and was not going to be retrenched.

[30] There can be no doubt that the reason for the respondent's dismissal was related to the transfer of the business as contemplated in section 187(1)(g) of the Act. Support for this can be found in a letter dated the 27th March 2003 from the appellants' attorneys to the respondent's attorney and in part of the evidence given by Smulders. In reply to a telefax from the respondent's attorneys dated 26 March 2003, the appellant's attorneys in the letter of the 27th March 2003- a week before the transfer of the business- stated that the sale of the business had impacted on the position of the respondent. In paragraph 6 of the letter the following is stated:

"***Where the sale transaction however does have an impact on your client's employment is that, after the same was concluded, Smulders, as the managing director, was of the view that the post of general manager and managing director were a duplication. From a structural and economic point of view, this is an issue of operational requirements which surely is within our client's prerogative….***"

In the same paragraph of the letter it is stated:

> "***As your client's position as general manger had become redundant, our client then consulted with your client as to alternatives. Your client was offered the alternative position as administration manager, with an accompanying remuneration package. Your client undertook to consider this alternative.***"

[31] In par 32 of their joint response to the respondent's statement of claim filed in the Labour Court the appellants stated that "**the [respondent] was transferred to the Second Respondent on the same terms**" This was factually incorrect but Mr Smulders conceded under cross – examination that, after 27 February 2003 he dealt with the business as if it had been transferred already and as if he and his brother already owned it even though the actual transfer had not yet occurred. In par 33.1 of their reply to the respondent's statement of claim, the appellants stated that "**the [respondent's] services was (sic) terminated due the operational requirements of the [second appellant].**" In par 33.2 the appellants said: "**upon the transfer of the business as an undertaking the employment between the [respondent] and the first [appellant] ceased to exist.**" In par 33.3 it is effectively stated that the second appellant was acting in the interests of its business when it embarked upon a restructuring exercise. In par 39.2 the appellants stated that "**(t)he the reason the [respondent] was dismissed was due to the Second [appellant's] operational requirements. It is therefore submitted that the Second [appellant] company does not have a General Manager position <u>available for the</u> [respondent] and would be seriously prejudiced should the Honourable Court award the requested relief**" (underlining supplied).

[32] Under cross – examination it was put to the respondent that the reason why his employment was terminated was that he could not transfer to the second appellant in the position of the General Manager and he was not prepared to accept the position of Administration Manager and, had he been prepared to accept that position, his contract of employment would have transferred to the second appellant. It was also put to the respondent that he could have avoided his retrenchment by accepting the alternative

position. Under cross – examination Mr Paul Smulders conceded that, when the respondent was dismissed, the conclusion of the agreement of the sale of the business was in its final stages.

In his evidence Smulders stated the following in regard to the respondent "**coming across**" to the second appellant upon transfer of the business**: "We said to Mr Van der Velde, both in speaking and in writing, that we had difficulties with him coming across as general manager, and we even proposed an alternative thing".**

It is common cause that when the respondent refused the proposed alternative position, he was told on the 28th of March 2003, that his employment was terminated with effect from the 31st of March 2003.

[33] The evidence referred to above reveals that the appellants' case was that as from about the 27th February Mr Smulders and his brother operated the business of the first appellant as if it had already been transferred into the second appellant. That was wrong because as a matter of law the first appellant's business remained with the first appellant until the 4th April. It was dangerous that the Smulders brothers operated the first appellant's business on the basis that it had already been transferred to the second appellant when it had not been transferred. This was dangerous because certain things which can be done of a business as a going concern after the transfer cannot be done before the transfer. An example of this is that in terms of sec 197(1) of the Act the services of an employee cannot, without the agreement of the employee's representative contemplated in sec 189 of the Act, be terminated prior to or at the time of the transfer of the business as a going concern and, therefore, the transfer of the contracts of employment of an employee on the basis that the operational requirements of the purchaser of the business or transfer of the business

dictate the termination of such services whereas after the transfer the purchaser of the business can dismiss any employee for operational requirements where the requisite operational requirements can be proved and the right procedure is followed.

[34] In this case the evidence referred to above also reveals that the appellants' case was that the operational requirements relied upon to dismiss the respondent were those of the second appellant. As at the 28th March when the respondent was informed that he was dismissed and as at the 31st March when his dismissal took effect, his dismissal for operational requirements could not be justified on the basis of the second appellant's operational requirements because he was not employed by the second appellant but by the first appellant. This notwithstanding, the fact that the appellants said that the respondent was dismissed for the second appellant's operational requirements is significant in that it provides the link between the transfer of the first appellant's business to the second appellant and the respondent's dismissal. In the absence of the transfer of the first appellant's business to the second appellant, the second appellant's operational requirements could have nothing to do with the respondent's continued employment or dismissal. It provides a basis for the conclusion that the respondent's dismissal was for a reason that is related to the transfer of the first appellant's business to the second appellant.

[35] The evidence referred to above also reveals that the appellant's case was that the second appellant did not have available for the respondent the position that he occupied in the first appellant. It is not permissible in terms of sec 197 that an employee be dismissed prior to the transfer of a business as a going concern and, therefore, not go across to the new

employer on the basis that that is what the operational requirements of the new employer dictate. For that to happen there would have to been an agreement of the employee's representative as contemplated in sec 189. That was the thrust of the minority decision in NEHAWU & others v University of Cape Town (2002) 23 ILJ 306 (LAC) in this Court which was confirmed on appeal by the Constitutional Court in NEHAWU v University of Cape Town (2003) 24 ILJ 95 (CC).

[36] Smulders, who was wearing two hats, one for the first appellant and the other for the second appellant, operated on the basis that the transfer of the business of the appellant to the second appellant had already occurred. Under cross-examination he said:-

> "**Well, my comment is simply as I've testified, that my brother, who was from the second [appellant] was involved in all these discussions with Mr Van der Velde. So in our minds we were working as if he had been transferred to us and it was our responsibility. We had to find this new position because his old position didn't exist. We had to negotiate with him about what his role was going to be, and in terms of the sale contract we couldn't do that without involving ASI. It is as simple as that."**

This evidence by Smulders reveals part of the appellants' problem. They could not dismiss the respondent to prevent him from being transferred into the employ of the second appellant upon the transfer of the business but they could dismiss him for operational requirements after the transfer if a fair reason existed and they followed a fair procedure. Sec 197 would be completely undermined if an employer who is about to sell a business to another would, prior to the transfer of the business and without the employee's consent, be entitled to dismiss for the transferee's operational

requirements employees whose contracts would otherwise transfer to the new employer upon the transfer of the business as a going concern.

[37] We am also of the view that, when the appellants' attorneys pointed in the letter of the 27th March to the respondent's attorney, where the sale transaction had impacted upon the respondent, they indicated in the clearest terms possible that the reason for the then imminent dismissal of the respondent was a reason related to the transfer of the business. The appellants' attitude was that there would be no position for the respondent in the second appellant once the transfer of the business, and thus the transfer of the contracts of employment, had occurred and, therefore, he should either agree to a different and lower position or face retrenchment. The fact of the matter is that the transfer of the business as a going concern had not yet occurred but was about to occur. In terms of sec 197 it is impermissible for the old employer to dismiss an employee because of or for a reason related to a transfer of a business as a going concern. This case is no different to a situation where a person who is about to buy a business as a going concern from another says to the seller: "**reduce your staff complement before I can buy your business otherwise I will not buy it"** and the seller goes ahead and does exactly that. It is a dismissal to facilitate the transfer of the business as a going concern. Such a dismissal is hit by the provisions of sec 187 (1) (g) of the Act and is automatically unfair. The Court a qouo's conclusion to this effect was not correct.

Compensation

[38] Sec 194 (3) of the Act governs the amount of compensation that the Labour Court may award to an employee whose dismissal has been found to be automatically unfair. Sec 194 (3) provides: "**The compensation**

awarded to an employee where 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 at the date of dismissal."

[39] In the appellant's heads of argument it was argued on behalf of the appellants that in the event of compensation being awarded to the respondent, such compensation should be limited to three months' remuneration. In support of this submission the Court's attention was drawn to the following factors which appear in the appellant's heads of argument:

(a) the appellant was offered an alternative position which he refused;

(b) the respondent started his business immediately upon leaving the first appellant's employment and in that business the respondent earned what he would have earned in the alternative position offerd to him by Smulders.

(c) the respondent sought to compete with the appellants immediately after leaving the business on the basis of information that he obtained whilst employed at the business of the first appellant and;

(d) the respondent's hands are not entirely clean in the matter.

[40] It is common cause that the alternative position offered to the respondent was lower than that which he held prior to his dismissal from the first appellant. The alternative position in fact amounted to a demotion with a reduced salary. At any rate there is serious doubt that an employer who dismisses an employee for a reason that is related to a transfer, for example, that the employee refuses to accept a lower position than the

one which he should still hold as he "**crosses over**" to the new employer, is entitled to use the employee's refusal to accept that lower position can rely on such refusal to say that the employee should not be awarded the full compensation that he or she would otherwise have been entitled to be awarded. After his dismissal, the respondent found himself in financial difficulties. He testified that he had to restructure his personal finances. He had to sell some of his shares to meet his liabilities. Whilst working for the first appellant, the respondent earned R 6600 000.00 per annum. After his dismissal and during 1994 his total income for the year was R337 750.00. In 2005 he earned a total income of R517,500. It is apparent that, after his dismissal, the respondent found himself in financial difficulty.

[41] In the Court below the Court noted that in terms of sec 194 (3) it had power to order the appellants to pay the respondent compensation up to a maximum of 24 months remuneration. It said that the respondent provided details of the income that he earned after his dismissal. The Court below pointed out that the respondent's earnings were not significantly less than the amounts he earned while employed by the first appellant. The Court a quo refused to take into account an amount of R 5 000.00 per month which the respondent also got which related to his expenses. The Court also had regard to the fact that any dismissal that is automatically unfair is a serious breach of those rights. The Court a quo ultimately said that it believed that an amount equivalent to twelve months remuneration would be just and equitable in all the circumstances.

[42] During oral argument Counsel for the appellants did not present any argument on the issue of compensation. As already amended earlier, sec

194 (3) of the Act provides that the amount of compensation which the Labour Court awards in respect of a dismissal that is automatically unfair dismissal must be "**just and equitable."** A decision on the amount of compensation particularly, where the statute provides that such amount should just and equitable is a decision that falls within the so-called "**narrow"** discretion of the Court. Neither in his heads of argument nor in his oral argument did Counsel for the appellant submit that there is present in this case any of the limited grounds upon which a Court of Appeal may interfere on appeal with the exercise of a narrow discretion by a Court of first instance. In this regard we are referring to such grounds as those to be found in cases such as Ex parte Neethling & others 1951 (4) SA 331 (A), Knox D' Archy Ltd & others v Jameson & others 1996 (4) SA 348 (A), Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A), Hix Networking Technologies v System publishers (pty) (1997) SA 391 (A), Shepstone & Wylie & others v Geyser NO 1998 (3) SA 1036 (SCA); Benson v SA Mutual Life Assurance Society 1996 (1) SA 776 (A) at 7811, National Coalition for Guy and Lesbian Equality v Minister of Affairs 2000 (2) SA 1 (CC). Indeed, we are of the view that there are no grounds in law to interfere with the exercise by the Court below of its discretion in this regard. It must be borne in mind that in awarding the respondent compensation equivalent to twelve months remuneration constituted the halving of the amount of compensation that the Court could have awarded.

[43] In light of the above and all circumstances of the case we are of the view the amount of compensation awarded by the Court below is just and equitable. Accordingly, the appeal must fail.

[44] With regard to costs we are of the view that the requirements of the law and fairness dictate that the appellants should pay the respondent's cost of the appeal.

ZONDO JP **JAPPIE JA**

I agree.

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TLALETSI AJA

APPEARANCES:

For the Appellants:	Mr S. Snyman
Instructed by:	Snyman Attorneys
For the Respondent:	Mr A. I. Redding SC
Instructed by:	Brian Bleazard Attorneys
Date of Judgment:	10 March 2009