IN THE LABOUR COURT OF SOUTH AFRICA JOHANNESBURG

JUDGMENT

Reportable

Case No.: J 1610/12

In the matter between:

SOLIDARITY OBO L.P. VAN EMMENIS Applicant

and

SIRIUS RISK MANAGEMENT (PTY) LTD Respondent

Heard: **06 March 2014**

Delivered: **20 August 2015**

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NGCUKAITOBI AJ

Introduction

[1] In this matter, two questions stand to be decided. First, whether the dismissal of Mr Lukas Van Emmenis (the employee) by the Respondent on grounds of

operational requirements was procedurally fair. Second, whether the employee is entitled to financial compensation.

[2] The question relating to the fair reason for dismissal is not disputed. The employee's claim is that the dismissal was not effected in accordance with a fair procedure in terms of sections 188(1)(b) and 189 of the Labour Relations Act, 66 of 1995 ('the LRA'). The basis for this is that there was no meaningful consultation as envisaged by section 189 of the LRA.

[3] The Respondent (the employer) disputes the employee's claims. It states that the consultation process achieved the objects of section 189 of the LRA. It submits that the employee is not entitled to any compensation even if this court concludes that the dismissal was procedurally unfair. This is because of two reasons. The first is that the employer discovered, after the dismissal of the employee, that he was involved in a business which competed with that of the employer, in conflict with the restraint of trade clause in his contract of employment. The second is that the employee was at any rate paid in excess of the minimum payment prescribed by section 41 under the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA').

[4] I commence this judgment with the issue of procedural fairness and thereafter consider whether the employee is entitled to compensation and, if so, the amount thereof. However, it is necessary to recount the material facts as they appear from the pleadings and the evidence led.

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Material facts

[5] The Respondent is a security firm. At the time of his dismissal, the employee was the branch manager at the Midrand office of the Respondent. He was dismissed with effect from 15 March 2012 by way of a letter dated 15 February 2012.

[6] For reasons which will become apparent later, it is important to mention at this

stage that the son of the Applicant, also called Lukas Van Emmenis, was employed by the Respondent in the position of technical manager.

[7] The substantive justification of the dismissal related to the financial difficulties experienced by the Respondent consequent upon the loss of certain important client contracts. This, in turn, must be understood against the nature of the business of the Respondent, which is the provision of security services. Mr Theodorus Vermaak, who testified for the Respondent explained that the Respondent lost four important client contracts: Mooikloof, a housing estate situated in Pretoria; Equestrian Estate, also a housing estate in Pretoria East; a contract to provide security at a German school, in Pretoria East; and a contract to provide security services at the office of the Auditor-General.

[8] The Midrand branch also serviced the Pretoria area. The reasons for the expansion of the area of focus of the Midrand office were also related to the operational requirements of the Respondent. At a certain point in time in the past, a decision was taken provide managerial support over Pretoria from the Midrand office. Since the employee was branch manager, he was intimately knowledgeable with the financial situation confronting the Respondent.

[9] The total financial loss, resulting from the loss of the contracts aforementioned was estimated to be in the region of R500,000 per month. The consequence of this loss was that the Respondents began to consider ways in which it could reduce its costs and thus sustain its viability. This included restructuring of its workforce resulting in dismissals being considered. The employee's position became one of those affected by the restructuring which ensued. Indeed, it was the argument of the Respondent that the employee, being the most senior employee in the Midrand branch, should have been aware of the financial situation of the Respondent and should have been an active player in developing solutions to the problem identified. Thus began a wide scale retrenchment, during which some 400 employees lost their jobs. The majority of those who were dismissed were security guards. The testimony of Mr Vermaak was that the number of security guards was reduced from about 700 to about

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400. Some managerial employees, including the employee, were also affected by the dismissals.

[10] The testimony of Mr Vermaak was that on 31 January 2012, he sent an email to the employee. The email reads:

> *"The viability of the company is now being subjected to further financial strain due to the recent spate of cancellation of security contracts. I regret to confirm that the company has no option but to embark upon an operational restructuring exercise.*
>
> *This having been said, meeting requests will be sent shortly as to the way forward for your area of operation.*
>
> *I would appreciate your input in this regard as to potential changes in restructuring your division."*

[11] According to Mr Vermaak, the meeting proposed in the e-mail was held with the employee on or about 2 February 2012. Although Mr Vermaak initially stated that in his recollection three parties attended the meeting, he accepted in cross-examination that only two people were present at that meeting, being himself and the employee. What was discussed at this meeting did not prove to be contentious at the trial, although some dispute appears from the pleadings. Mr Vermaak accepted that there was no specific mention of the possibility of the employee being considered for retrenchment. Instead, the discussion was of a general nature, focused on the financial challenges faced by the company in light of the loss of the contracts. From his perspective, the employee also did not make suggestions relating to restructuring and particularly which positions could be done away with so as to save costs. In fact, as Mr Vermaak testified, the answer of the employee was that there was no need to embark upon any restructuring. His view was that the Midrand office, in fact, was understaffed.

[12] Neither the employer nor the employee appears to have given consideration to the issue of whether any other aspects of the business could be considered for cost savings.

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[13] The position of the employee was further reiterated in an email dated 6 February 2012. In this email, the applicant listed all positions in Pretoria and Midrand, as being potentially affected. In evidence, however, he denied being aware that his position would be identified for redundancy until 15 February 2012, when he was dismissed.

[14] During the trial, some time was taken on the issue of the two week sick leave taken by the employee from 30 January 2012 to 12 February 2012, which was the period during which the consultation process took place. At this period, the office of the Applicant was converted into a control room. A complaint was made regarding this and particularly its impact on the consultation. In my view, however, this issue is of peripheral importance to the determination of the procedural fairness of the dismissal. On the facts, a grievance was made by the Applicant and seems to have been addressed within the structures of the respondent. In any event, it appears that the office of the employee had previously been a control room. The financial constraints of the Respondent also meant that it had to consider the utilisation of office space, which included the conversion of individual office spaces into general and/or communal use. Furthermore, the employee in fact was allocated an area from which he could execute his duties, during the short period after his return from sick leave on 12 February 2012, until the date of his dismissal being 15 March 2012.

[15] Subsequent to the email addressed by the employee to the Respondent on 6 February 2012 a decision was taken to dismiss the employee. Mr Vermaak testified that he had a meeting with Mr Gerber, who was the General Operations Manager, at the time. (Mr Gerber was also subsequently retrenched). It was at this meeting, held on or about 9 February 2012, that the decision to dismiss the Applicant was taken. Prior to this, so Mr Vermaak testified, the dismissal of the Applicant had not been considered.

[16] In answer to a question emanating from the bench, regarding the reason for consulting the employee on 2 February 2012, if his position was not considered as being liable for dismissal, Mr Vermaak testified that "*at that point ... we were*

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looking for ways of resolving it; whether there are any possible other members that we could have considered for retrenchment." In cross-examination Mr Vermaak confirmed that the employee was not in fact informed that he was facing a possible retrenchment until 15 February 2012, when he received a letter of dismissal.

[17] On 15 February 2012 the employer addressed a letter of dismissal to the employee. The letter states:

> "The e-mail to you dated 31 January 2012, as well as a formal meeting on 2 February 2012 regarding changes in operational requirements refers.
>
> As indicated during the commencement of the initial process, the viability of the company is now being subjected to further financial strain due to the recent spate of cancellation of contracts. In your follow-up correspondence, dated 6 February 2012, you indicated that there were no operational changes to be made and that service levels would be compromised if any of the operational staff were to be restructured in any way. The financial situation of the company, and therefore the operational requirements, however, remains unchanged.
>
> A decision has therefore been taken that the position of the Branch Manager, Midrand be declared redundant with immediate effect. In terms of this decision the operational staff would report directly to the Johannesburg operations. You are herewith notified that your service will be terminated, effective 15 March 2012 and the period from this letter to the date of termination will be regarded as your notice period. You would, however, not be required to tender your services during this period and would be paid in lieu of such notice."

[18] The letter was presented at a meeting attended Mr Vermaak and the employee. According to Mr Vermaak the purpose of this meeting was to convey the decision of the employer to dismiss the Applicant.

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[19] I mentioned earlier the position of the son of the Applicant. It was common cause that he had volunteered for his dismissal for operational reasons and was paid accordingly. It was established, in evidence, that prior to his dismissal (during the period of his employment) he had registered a company known as Chronicle Solutions (also referred to as Chronicle Security). This company also provided security services, like the Respondent.

[20] Some aspects about this company, the significance of which will be dealt with later, should be mentioned.

20.1 Its registered address was the same as the employee's residential address.

20.2 The cell phone number, listed in its promotion material as being the contact number for the company, was that of the employee.

20.3 The employee accepted that he delivered copies of the promotion material in the form of brochures of the company to potential customers.

20.4 The Respondent lost one of its customers, Bosal, to the company Chronicle Security.

20.5 Some of the promotional material contained the picture of the employee as the contact person for Chronicle Security.

[21] In evidence, the Applicant attempted to distance himself from Chronicle Security and claimed that he had little or no involvement in its affairs as it was a company run and managed by his son. But this attempt is not credible in light of the evidence summarised above. Moreover, it was the employee's own evidence that he discussed the business affairs of Chronicle Security with his son. It was also his evidence that he assisted his son by delivering promotion brochures of Chronicle Security to potential customers. Furthermore, he did not adequately answer the evidence presented on behalf of the Respondent that his cell phone number and picture were used in promotional material of the company.

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[22] Against the above matrix of fact I consider the issue of procedural fairness.

PROCEDURAL FAIRNESS

Principles applicable

[23] A useful starting point is section 23(1) of the Constitution which provides that everyone has the right to fair labour practices. This right, in turn, is given effect by the LRA. In relation to dismissals specifically, the LRA provides for certain rights and remedies. Sections 185 and 188 of the LRA protect employees against unfair dismissal. Section 185 says that no employee may be dismissed unfairly. In terms of section 188 an unfair dismissal includes a dismissal where the employer fails to comply with a fair procedure.

[24] In relation to dismissals for operational requirements, section 189 of the LRA is applicable. It contains the following requirements for procedural fairness:

24.1 When an employer contemplates dismissing an employee for operational reasons it must consult with the affected employee. (Section 189(1)).

24.2 The employer and the employee being consulted must engage in a meaningful joint consensus-seeking process and attempt to reach consensus on certain items including measures to avoid dismissals, to minimise the number of dismissals, to change the timing of dismissals and mitigate their effects on employees. Furthermore the joint consensus-seeking process must be aimed at reaching agreement on selection criterion and severance pay. (Section 189(2))

24.3 The employer must issue a written notice inviting an employee to consultation and its notice should disclose all relevant information which must include the reasons for the proposed dismissals, any alternatives considered by the employee and other relevant information. (Section 189(3))

24.4 In the consultation process the employer must respond to the

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representations made by an employee and where these are rejected reasons for the rejection must be stated. (Sections 189(5) and (6)).

24.5 Where an employer proceeds with a dismissal the selected employee should be selected based on agreed criteria or alternatively criteria which are fair and objective (Section 189(7)).

[25] Commenting on the nature of the consultation contemplated by section 189, in *Johnson and Johnson (Pty) Ltd v CWIU [1998] 12 BLLR 1209 (LAC)*, it was held:

> "[26] The section places some primary obligations on an employer in order to ensure that an employee is not unfairly dismissed. The employer must initiate the consultation process when it contemplates dismissals for operational reasons (section 189(1); *FAWU and another v National Sorghum Breweries [1997] 11 BLLR 1410 (LC) at 1420F–1421B; (1998) 19 ILJ 613 (LC) at 623C–I)*. It must also disclose relevant information to the other consulting party (section 189(3)); it must allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting (section 189(5)); it must consider those representations and, if it does not agree with them, it must give its reasons (section 189(6)).
>
> [27] But all these primary formal obligations of an employer are geared to a specific purpose, namely to attempt to reach consensus on the objects listed in section 189(2). The ultimate purpose of section 189 is thus to achieve a joint consensus-seeking process. In this manner the section implicitly recognises the employer's right to dismiss for operational reasons, but then only if a fair process aimed at achieving consensus has failed. This is also apparent from section 189(7) which provides that the employer must select the employees to

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be dismissed on criteria either agreed to, or if that is not possible, on criteria that are fair and objective.

[28] The achievement of a joint consensus-seeking process may be foiled by either one of the consulting parties. The employer may obviously frustrate it by not fulfilling its obligations under section 189(1), (3), (5), (6) and (7). The other consulting party may do it by refusing to take part in any of the stages of the consultation process, or by deliberately delaying the whole process (cf *NEHAWU v University of Fort Hare [1997] 8 BLLR 1054 (LC); UPUSA and others v Grinaker Duraset [1998] 2 BLLR 190 (LC) at 204D; Fowlds v SA Housing Trust Ltd and another, unreported case no J561/98 (LC)* at paragraph 11). It may also appear that any one of the parties simply went through the entire formal process with no intention of ever genuinely reaching agreement on the issues discussed. These different possibilities depend on the facts of each particular case.

[29] The important implication of this is that a mechanical, "checklist" kind of approach to determine whether section 189 has been complied with is inappropriate. The proper approach is to ascertain whether the purpose of the section (the occurrence of a joint consensus-seeking process) has been achieved *(cf Maharaj and others v Rampersad 1964 (4) SA 638 (A)* at 464; *Ceramic Industries Ltd t/a Betta Sanitaryware (supra) at 701G–702H (BLLR); 676B–677C (ILJ); Ex parte Mohuloe (Law Society Transvaal intervening) 1996 (4) SA 1131 (T) at 1137H–1138D)*."

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[26] The purpose then, of a retrenchment consultation, is to achieve a meaningful joint consensus-seeking process. In the unreported judgment *of Supergroup Trading (Pty) Ltd v Janse van Rensburg [2012] ZALAC 7 (25 April 2012)* the Labour Appeal Court in a unanimous judgment criticised the consultation in these terms:

"[20] The consultations were a "charade" or as the court a quo thought it was a "sham". It was purposeless insofar as it deprived the Respondent of a chance to save his post or avoid his being selected for retrenchment. His representations on that score were to be fruitless because restructuring was a fait accompli."

[27] Earlier, at paragraph [4] of the judgment the LAC made the above point in prescient terms:

"[4] The decision to abolish the post of the Chief Operating Officer (the COO) relates to the crux of the Respondent's complaint. The Court a quo correctly appreciated this. The purpose of consultation is to try and save a job or position. If this cannot be done the next aim is to avoid dismissal by placing the person, whose post has become redundant, elsewhere. And if avoidance is not possible consultation concerns the extent to which the consequences of the retrenchment can be mitigated."

[28] The court continued:

"[5] If the decision to make a post redundant is set in stone and not open to revision or discussion then the main aim of consultation has been thwarted before it has begun. If the decision to retrench a certain person has been pre-decided, consultation about whether this person should be chosen is a sham. What remains is consultation on the mitigation of retrenchment."

[29] A key purpose behind a consultation is therefore the protection of employment. This approach is consistent with the views expressed by the Constitutional Court in *National Education Health and Allied Workers Union v University of Cape Town and Others 2003 (3) SA (1 (CC)* that security of employment is a core constitutional value protected through the LRA.

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Application to the facts

[30] In my view, the conduct of the Respondent herein fell short of the procedural requirements of section 189 of the LRA, for these reasons:

30.1 Section 189(1) of the LRA requires an employer, when it contemplates dismissing an employee to consult with the affected employee on a range of topics. On the facts herein, there was a consultation held on 2 February 2012. No further consultation was held. However, it was common cause that as of 2 February 2012 the dismissal of the employee was not yet contemplated.

30.2 When an employer invites an employee for purposes of retrenchment consultation, section 189(3) of the LRA requires that employer to disclose all relevant information to the employee, prior to the intended consultation. The notice inviting the employee to the consultation, dated 31 January 2012, did not meet the prescripts of section 189(3). It disclosed no relevant information, other than general references to the fundamental difficulties and the need for retrenching. It did not address the specific question whether the position of the employee was affected and the reasons why the position was affected. During the consultation itself, no discussion was held with regard to whether or not the position of the employee would be affected and the reasons why it would be affected.

30.3 The consultation must be a meaningful exercise, aimed, first and foremost at the retention of any job which is affected by the potential retrenchment. If the job cannot be saved, the consultation must shift to other measures to ameliorate the hardship associated with dismissal. The consultation held herein did not meet this object. As noted, the employer had not as yet formulated a clear position as to whether it was in fact contemplating the dismissal of the employee, when a meeting was held on 2 February 2012.

30.4 The employer only began to consider the dismissal of the applicant on 9

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February 2012 in the discussion between Mr Vermaak and Mr Gerber. It was common cause that there were no consultation meetings held with the applicants after that date. The next meeting was on 15 February 2012, when the Applicant was presented with a letter of dismissal.

[31] I conclude, therefore, that the employer has failed to prove that the dismissal was effected in accordance with a fair procedure in terms of sections 188(1)(b) and 189 of the LRA.

[32] The question remaining is whether or not the employee is entitled to any compensation and, if so, the amount thereof. It will be recalled that the employer disputed the employee's entitlement to compensation, irrespective of my conclusion as to whether the dismissal was procedurally fair or not. The two grounds upon which the entitlement was disputed related to the conduct of the employee in regard to his involvement in a competing business and the fact that he was paid in excess of his statutory entitlement under the BCEA.

COMPENSATION

Principles applicable

[33] The remedies for unfair dismissal are provided for in sections 193 and 194 of the LRA. Section 193 of the LRA deals with remedies for unfair dismissal and unfair labour practice. In terms of section 193(1), a court or arbitrator adjudicating an unfair dismissal dispute, may award one of three remedies (either separately or in combination):

33.1 reinstatement;

33.2 re-employment; or

33.3 payment of compensation.

[34] Section 194(1) of the LRA deals with limits on compensation and provides:

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> *"The compensation awarded to an employee whose dismissal is deemed 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 twelve (12) months remuneration calculated at the employee's rate of remuneration on the date of dismissal."*

[35] Compensation accordingly is a matter of remedial discretion of the Court. The main criterion is that compensation must be just and equitable.

[36] In *Equity Aviation Services (Pty) Ltd. v Commission for Conciliation, Mediation and Arbitration & Others 2009 (1) SA 390 (CC)*, the Constitutional Court emphasised the discretionary nature of compensation under sections 193 and 194 of the LRA. This discretion operates at two levels. First, the court has discretion whether or not to award any compensation pursuant to a finding of procedural unfairness. Second, once the court has elected to award compensation, the compensation must be just and equitable. As such, the first point of enquiry is the likelihood of the court granting compensation at all.

[37] The case of *Johnson and Johnson (Pty) Ltd v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC)* concerned compensation to be paid to an employee whose dismissal for operational reasons is unfair because of the failure on the part of the employer to follow the procedure prescribed by section 189 of the LRA.

[38] Leaving aside the *"all or nothing"* approach to compensation, which was dealt with in this case, (but is no longer relevant since the 2002 amendments to the LRA), this case also explained the object behind compensation in terms of section 194 of the LRA. The object of compensation is to compensate an employee for the loss of a fair procedure. It is not to pay an employee for any actual patrimonial losses sustained. The Court held in this regard:

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"Even if it is accepted that that compensation means 'a sum of money for something lost' the 'something lost" under section 194(1) is the employee's right to a fair hearing or procedure prior to dismissal….The compensation for the wrong in failing to give effect to an employee's right to fair procedure is not based on patrimonial or actual loss. It is in the nature of a solatium for the loss of the right, and is punitive to the extent that an employer (who breached the right) must pay a fixed penalty for causing that loss. In the normal course a legal wrong done by one person to another deserves some form of redress. The party who committed the wrong is usually not allowed to benefit from external factors which might have ameliorated the wrong in some way or another. So too, in this instance. The nature of an employee's right to compensation under s194(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."

[39] In *Scribante v Avgold Ltd (2000) 21 ILJ 1864 (LC) Damant AJ*, after an exhaustive reference to authorities held:

"Having weighed up the authorities, in my view the relevant factors to be taken into account in determining whether to award compensation or not are the following:

whether the employer has already provided the employee with substantially the same kind of redress;

whether the employer's ability and willingness to make that redress is frustrated by the conduct of the employee;

the degree that the employer deviated from the requirements of a fair procedure;

Whether the employer secured alternative employment for that employee.

I am satisfied that it is not appropriate to take into account the actual loss sustained by the employee, whether the employee successfully obtained alternative employment immediately after the dismissal, whether the

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employee did or did not mitigate his loss, and the period it would have taken to effect a fair dismissal. I am also satisfied that the other factors considered in the BrandAdd case such as length of service, prospects of finding alternative employment and the financial position of the employer, are not relevant factors."

[40] In *Alpha Plant & Services (Pty) Ltd v Simmonds & Others (2001) 22 ILJ 359 (LAC) Goldstein AJA* found it unnecessary to deal with the relevance or otherwise of patrimonial loss but considered it relevant to consider the extent of the employer's deviation from the requirements of consultation and assistance laid down by the LRA when deciding whether or not to award compensation.

[41] It is thus apparent from this analysis that the paramount object behind compensation is to atone for loss of procedure. Patrimonial loss would ordinarily not play a major role. Some degree of jurisprudential dissension is, however, apparent in relation to the issue of patrimonial loss – at least in the context of whether an employee has "mitigated their losses", subsequent to dismissal. Cases such as *Whall v BrandAdd Marketing (Pty) Ltd (1999) 20 ILJ 314 (LC)* hold the view that the question of actual losses sustained by an employee could be a legitimate factor to take into account in specific circumstances. The following passages from the Whall is relevant:

"[35] When exercising the discretion as to whether to grant compensation the Court must, in my opinion, have regard to what is fair to both the employee and the employer. One of the purposes of the Act is to protect employees against unfair dismissal (section 185). Others are to advance economic development (section 1) and to effectively resolve labour disputes (section 1(d)(v)). While the punitive effects of section 194(1) may be ameliorated by the (implicit) limit of compensation to the equivalent of 12 months' remuneration, the decision as to whether to order compensation must nevertheless in my view be exercised with the above considerations in mind.

[36] As section 194(1) prescribes a minimum, establishing what fairness in this context requires must entail comparing what the Court considers

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the employee should have received had there been no statutory minimum with what the employee must receive in terms of that statutory minimum. If there is a substantial difference between the two figures, the Court must decide whether denying compensation would be more unfair to the applicant than granting the prescribed compensation would be to the respondent. The assessment of what the employee should have received must, in turn, require the Court to examine factors such as the actual patrimonial loss suffered by the applicant in consequence of his or her dismissal, his or her length of service with the employer, his or her prospects of finding alternative employment, the financial position of the employer, and so on: see the criteria listed by the Court in Ferodo (Pty) Ltd v De Ruiter (1993) 14 ILJ 974 (LAC) at 981 D-G."

[42] This view, confirming the relevance of patrimonial loss in the determination of just and equitable compensation, appears to have been received some support from the Labour Appeal Court in the case of *HM Liebowitz (Pty) Ltd t/a Auto Industrial Centre Group of Companies v Fernandes (2002) 23 ILJ 278 (LAC)*. Zondo JP (as he then was) concluded on the facts that patrimonial loss was not a relevant consideration in his assessment of a just and equitable compensation. However, he held that it is wrong, in principle to exclude patrimonial loss as a factor which may be taken into account in an enquiry about what is just and equitable in terms of section 193 and 194 of the LRA. At paragraph 22 the court held:

"In such a case it seems to me that patrimonial loss is relevant because, if no patrimonial loss was suffered, an award of compensation exceeding the minimum may offend the requirement of the subsection that compensation awarded must be "just and equitable in all the circumstances". This does not necessarily mean that the absence of patrimonial loss would operate as a bar to the Court awarding compensation exceeding the minimum. Indeed, there may well be circumstances which satisfy the Court that, despite the absence of patrimonial loss, it would be "just and equitable in all the circumstances" for the Court to award the employee compensation that goes beyond the minimum - even up to the maximum."

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[43] Another important finding made by the LAC in the *Liebowitz* decision was that there is a distinction between compensation payable to an employee who should not have been dismissed (this is an instance where the dismissal is also substantively unfair) and an employee who should have been dismissed (this is a case of procedurally unfair dismissal). A Court deciding on appropriate compensation must reflect this distinction in its award. In cases, such as the present, where the dismissal is for operational reasons, it should be remembered that the dismissal is, by definition, a "no-fault" termination. But the issue of whether the dismissal is substantively fair would still be relevant, insofar as it would show that the decision of the employer was motivated by genuine operational considerations.

[44] In *Kemp t/a Centralmed v Rawlins (2009) 30 ILJ 2677 (LAC)* the LAC decided to refuse compensation notwithstanding the fact that the dismissal was held to be unfair. In coming to its decision the LAC tabulated the factors to be taken into account when deciding whether to award compensation pursuant to a finding of unfairness in a dismissal and when deciding the amount of compensation. It held:

> *"[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*

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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."

[45] On the facts of the case, the court held that the employee was not entitled to

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any compensation because she had been offered reinstatement which she refused without reasonable grounds. It was noted that had the employee accepted the reinstatement offer, she would not have suffered any patrimonial loss.

[46] Compensation, for procedural unfairness, also includes a punitive element. This has been acknowledged in the case, for instance, of *Viljoen v Nketoana Local Municipality (2003) 24 ILJ 437 (LC)*. In this case it was stated that compensation is not an award for damages in the contractual or delictual sense. It includes a penal element against the employer for failing to get the procedure right, as well as an element of solace to the employee, in the sense that the employee has lost the right to be given a procedurally fair dismissal, which is entrenched by the LRA.

[47] Given the role of solace which is played out in the assessment of compensation, the Labour Appeal Court, in the case of *Minister for Justice & Constitutional Development & Another v Tshishonga (2009) 30 ILJ 1799 (LAC)*, had regard to the role played by *solatium* in compensation. At paragraph 18 the following was stated:

> *"The question thus is what is just and equitable in circumstances where the compensation is for non-patrimonial loss. In this connection, some assistance can be gained from the jurisprudence relating to the award of a solatium in terms of the actio injuriarum. In these cases the award is, subject to one exception, of a non-patrimonial nature, and is in satisfaction of the person who has suffered an attack on their dignity and reputation or an onslaught on their humanity. The exception is for the amount relating to the costs of R177 000,00 which were incurred by respondent in having to defend himself, and which are patrimonial by nature. Factors regarded by the court as relevant to the assessment of damages generally include the nature and seriousness of the iniuria, the circumstances in which the infringement took place, the behaviour of the Defendant (especially where the motive was honourable or malicious) the extent of the plaintiff's humiliation or distress, the abuse of a relationship between the parties, and the attitude of the defendant after the iniuria had taken place. It should be*

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noted that this list is not exhaustive, in that specific forms of infringement have their own peculiar factors to consider."

[48] There are two broad categories of cases where the courts have refused compensation.

48.1 The first instance, which is typified by the Transnet case, is where the conduct of the employee is sufficiently serious so as to conclude that an employee is not entitled to any compensation, despite the fact that the dismissal is found to be procedurally unfair.

48.2 The second instance is that highlighted by the Rawlins decision, where the LAC refused compensation because the employee had been offered a reasonable alternative position but refused it without justification. In other words the unreasonable conduct on the part of the employee, after the dismissal is a factor to be considered, particularly where the unreasonable conduct is in response to an offer of reinstatement, which in effect, would remedy the wrong caused by the unfair dismissal.

[49] From the judgment of *Johnson & Johnson* compensation for procedural unfairness flows from two considerations. The first is to compensate the employee in the form of *solatium*, for the statutory right which has been lost by the procedurally unfair dismissal. The second is to punish the employer for failing to comply with the correct procedures which are in the LRA. I must apply the principles by reference to the facts herein.

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Application to the facts

[50] On the facts, the denials of the Applicant with regard to his involvement in Chronicle Security are rejected.

50.1 The registered address of the business was also his residential address. That he also lived with his son is not material. He testified that his son paid him rental.

50.2 The profile of Chronicle Security contained the employee's cell phone number and his picture.

50.3 There was no credible denial that at least one client of the Respondent, Bosal had been contacted by the Applicant promoting Chronicle Security and as a result had in fact left the Respondent and signed up with Chronicle Security.

50.4 It was established in the evidence that the Applicant "assisted his son" by dropping off copies of the profiles of Chronicle Security to potential customers, which was in conflict of the business of the employer, the Respondent.

[51] I consider these to be inconsistent with the provisions of the contract of employment of the employee which provides, in the relevant clause:

> *"Lucas Petrus Van Emmenis undertakes in favour of Sirius Risk Management (Pty) Ltd that for the duration of this agreement he will be restraint as herein after provided, from directly or indirectly carrying on, being involved in or interested in any business whatsoever whether or not in competition with Sirius Risk Management (Pty) Ltd, other than in terms of the provisions of clause 9.5 or with the prior approval of the board of Sirius Risk Management."*

[52] However, this dispute is not about the breach of the contract of employment, but the fairness of the dismissal. The issue of alleged breach of contract only arose in the context of an assessment of compensation to be paid. I accept that compensation must be just and equitable. While these terms are necessarily inexact, they are not a licence to take into account any information presented to the Court including where there is no clear evidentiary link to the dispute. The evidence which can properly be taken into account must be relevant to the objects of the compensation, namely, the solace element and the punitive element, as aforesaid.

[53] For reasons which I set out below, I conclude that the Applicant is entitled only

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to nominal compensation.

53.1 The Applicant was a senior employee. The loss of client contracts occurred in his area of responsibility, being Midrand and Pretoria. He was clearly aware of the loss of contracts, and the resultant financial impact of such losses. Particularly, he would have been aware of the threat to the financial viability of the Respondent. It was, in part, his responsibility to assist the employer in addressing the financial challenges which it faced. Unlike junior employees, he should have anticipated the restructuring. When he was specifically informed of the potential restructuring on 31 January 2012, it is not unreasonable to have expected the employee to anticipate that his position could potentially be affected. In summary, given his unique position and access to critical information, the employee should reasonably have anticipated his potential dismissal for operational reasons.

53.2 I consider that the degree of departure from a fair process was not so serious as to justify substantial compensation. The employer in fact consulted with the applicant, although I have concluded that the actual consultation fell short of the standards prescribed by section 189 of the LRA.

53.3 The Applicant was being untruthful when he attempted to distance himself from Chronicle Security. Ordinarily, the issue of the potential breach of his contract of employment in this respect would have been an irrelevant consideration. Here, it is relevant in the following respects. Firstly, the reason leading to the financial difficulties of the Respondent which necessitated the restructuring in the first place was the loss of contracts. The evidence was that the employee was actively promoting a competing business, thus contributing to the very loss of contracts which led to the restructuring in the first place. On the facts, it is known that Bosal, a client previously of the Respondent, subsequently signed up with Chronicle Security, and terminate the relationship with the Respondent. Secondly, I take into account the fact that the employee gave untruthful evidence with regard to his association with Chronicle

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Security at the trial. Thirdly, the employee derived financial benefit from Chronicle Security, through the rentals which were paid by his son, who was living on his property. Fourthly, the Respondent paid the employee in excess of the statutory minimum. Even though the payment was discretionary, it is relevant in the exercise of discretion relating to just and equitable compensation.

[54] In these circumstances, I consider that the financial compensation of one month is just and equitable.

ORDER

The following order is made:

(a) The Respondent failed to prove that the dismissal of the employee for operational reasons was effected in accordance with a fair procedure.

(b) The Respondent is directed to pay the Applicant an amount equivalent to one month compensation, at the scale applicable at the time of dismissal.

(c) There is no order as to costs.

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NGCUKAITOBI AJ

Acting Judge of the Labour Court of South Africa

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APPEARACES

For the Applicant: Union Official – Hendrick van der Hoven

Instructed by: Solidarity

For the Respondent: Adv B Roode

Instructed by: Deon de Bruyn Attorneys