IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO : JR617/07

In the matter between:

SIMON NAPE Applicant

and

INTCS CORPORATE SOLUTIONS (PTY) LTD Respondent

JUDGMENT

BODA AJ

INTRODUCTION

1. The facts of this case are indicative of what commonly happens to employees employed by labour brokers.

2. After the Applicant committed an act of misconduct (he sent an email containing offensive material at the client's premises to one individual), the client, Nissan (Pty) Ltd, invoking its contractual rights, demanded that the Respondent, its Labour Broker, remove the Applicant from Nissan's premises.

3. The Respondent, as the Applicant's employer, suspended the Applicant and after a disciplinary hearing, determined that a final written warning instead of dismissal was an appropriate sanction. The Applicant agreed to the written

warning but Nissan was not satisfied and refused to allow the Applicant access to its premises.

4. The Respondent was obliged, in terms of its contractual relationship with Nissan to accede to Nissan's demands and accordingly invoked the provisions of section 189(a) of the Labour Relations Act, 66 of 1995 ("*the Act*") and after a consultation meeting with the Applicant, found no alternative position and retrenched him.

5. It is common cause that the Applicant found work immediately thereafter at a higher salary and suffered no financial loss at all.

6. Nevertheless, the Applicant persists with his claim for compensation that is just and equitable. Mr Levin, acting on his behalf, contended that the dismissal was both substantively and procedurally unfair and submitted that the Applicant should be granted just and equitable compensation.

7. Mr Beaton, acting on the Respondent's behalf, countered, contending that the dismissal was in all respects fair and that in any event even if it was not , the Applicant would not be entitled to any compensation at all or at best, only one month's compensation.

8. The issues to be determined are accordingly whether or not the retrenchment of the Applicant from the employ of the Respondent, who is a Labour Broker, was substantively and procedurally unfair and if so, what compensation, if any, should be awarded.

9. I am grateful to both representatives for their helpful and able arguments.

10. Neither of the parties raised the issue of joinder of Nissan to these proceedings. In my view it was not necessary to join Nissan to these proceedings for at least three reasons. Firstly, the Applicant did not claim Nissan to be his employer. In terms of section 198 of the Act the applicant has no claim against Nissan for unfair dismissal (compare for example **State Information Technology Agency (SITA) (Pty) Ltd v CCMA & others** [2008] 7 BLLR 611 (LAC)). Secondly, the Applicant did not claim reinstatement but only compensation. (**Gordon v Department of Health: KwaZulu-Natal** [2008] 11 BLLR 1023 (SCA). Thirdly, the Applicant did not claim that the labour broker arrangement was a sham (compare **State Information Technology Agency (Pty) Ltd (*"SITA"*) v Swanevelder & others** [2009] JOL 23479 (LC)).

11. I propose to set out the facts in greater detail. I thereafter deal with the complaint that the dismissal was substantively unfair followed by the procedural challenges and finally with the issue of compensation.

The Facts

12. Two witnesses testified at the hearing : Mrs Samantha Jane Boyce ("*Boyce*"), a Director of the Respondent, and the Applicant.

13. The facts were, save in one minor respect, largely common cause. For reasons that will follow, where there were factual disputes, I have preferred the version of the Respondent over the Applicant's.

14. The Respondent had a labour broking contract with Nissan and other clients in terms of which it agreed to supply mainly specialised computer programming consultants and engineers to clients on the basis that the Respondent would be the employer of the employee. The Respondent was not in the business of supplying sales persons as labour.

15. The Respondent procured Nissan as a client in 2000. It supplied brand managers and computer project managers to Nissan. These managers earned above R35 000 per month.

16. In terms of the standard arrangement, Nissan had the right to require the employee to be replaced for any reason whatsoever, with someone else or, as the evidence shows, to request that the employee be removed from its premises.

17. At the special instance and request of Nissan, the Respondent agreed during or about 2005 to employ Sales Trainees for Nissan on the same basis because Nissan had placed a moratorium on the hiring of employees. The Trainees would be employed by the Respondent, receive training from Nissan for a limited duration and would thereafter either continue to work at Nissan or be deployed to find their own jobs.

18. The Applicant was one of many Trainees to be so employed by the Respondent during 2005.

19. From all the Trainees, the Applicant was the only one to remain at Nissan but on the same basis, namely that he would continue to be employed by the Respondent and not Nissan in the capacity of sales consultant.

20. The Applicant was first placed on a probationary contract for a few months, and then placed on a fixed term contract for a few months which was again renewed in August 2006.

21. This last contract was again with the Respondent and was due to expire on 31 August 2007.

22. Pursuant to the employment contract between the Applicant and Respondent, the Respondent was allowed to terminate the Applicant's contract, before 31 August 2007, inter *alia*, "*on grounds proven by the client to be reasonable and/or substantively and procedurally fair.*"

23. The latter clause, however, is not to be found in the contract between the Respondent and Nissan which, as I have stated, allows Nissan to request the removal of the Applicant on any grounds whatsoever.

24. During September 2006 the Applicant, while at Nissan, received an offensive email and distributed it to another individual at Nissan using Nissan's computer. Nissan took offence to this and demanded that the Applicant be removed.

25. As mentioned in the introduction, the Respondent suspended the Applicant and thereafter determined at a disciplinary hearing that a final written warning

should be imposed and not dismissal. The Applicant pleaded guilty, demonstrated remorse and agreed with the sanction.

26. The Respondent duly communicated the findings of the hearing to Nissan but in an email dated 14 September 2006 Nissan said "*we view the incident committed by Simon as very serious. As discussed our policies are very clear in this regard and as a result, we do not want Simon back on our premises in any capacity*."

27. On 20 September 2006, the Respondent wrote to the Applicant in terms of section 189(a) of the Act, informing him that as a result of economic reasons, it was contemplating retrenching him because Nissan had informed it that it no longer needed the Applicant's services.

28. The notice contained the usual information one finds in any section 189(a) notice and recorded the Respondent's proposals about alternatives considered, the selection criteria, proposals on severance pay and so on. I agree with Mr Levin when he says that the notice is at places vague because it transpired that the Respondent simply copied large portions from a precedent. But I am overall satisfied that the notice was sufficiently clear enough for the Applicant to understand the issues and proposals. As I have stated earlier, the facts, all along, were mostly common cause.

29. The Respondent had one consultation meeting with the Applicant on 16 October 2006. The minute of the consultation was introduced in evidence. The Applicant alleged that during this meeting, he had made a proposal to be swapped, but in response he was told to shut up. I reject his version that he

was told to shut up, because it was neither pleaded nor put to Boyce, who testified that she was present during the meeting.

30. I also accept Boyce's evidence that the meeting lasted about an hour.

31. She, however, conceded that although the minute did not record this, either during this meeting or perhaps at some time, the Applicant did make a proposal to be swapped. However, he was told that there was no place he could be swapped in because his position was an exception in that all the Respondent's other clients required specialised skills which he did not possess.

32. Save in this one respect, the minute recorded what was discussed at the meeting and I accept the record as being accurate.

33. The minute shows that the Respondent discussed and consulted on proposals on: "appropriate *measures to avoid the dismissal , change the timing of the dismissal, appropriate measures to mitigate the adverse effects of dismissal, selection criteria, severance pay and alternatives considered."* The Applicant was the only person to be retrenched. The consultation process concluded that there was no alternative position he could be placed in.

34. The minute recorded that at several points, the Applicant did not make any proposals but placed in dispute the substantive rationale for dismissing him.

35. It is common cause that the Applicant at no point, either during the meeting or even at the trial, identified a specific position he could be placed in or in which he could be swapped.

36. On 23 October 2006, the Applicant was informed that he was retrenched and he was paid one week per year of service as severance pay, notice pay and other statutory payments.

37. The Applicant earned R16 571.98 per month. His final payment came to R30 044.78.

38. In effect he was paid up to 15 November 2006. On the same date he commenced employment at a higher salary with another employer.

39. It is also common cause or at least not disputed that the Respondent stopped receiving any reimbursement or fee from Nissan in respect of the Applicant's salary since September 2006 and that it carried the cost of the package and salary, without having received any value in return from its client.

40. I also accept that Nissan was a large client of the Respondent and that Nissan had superior bargaining power. This much is demonstrated by the very fact of the Applicant's employment. The Respondent agreed to employ the Applicant as a favour to Nissan even though its main business was focussed on computer and engineering specialists. This much is also apparent from Nissan's refusal to accept the agreement between the Applicant and Respondent that a final written warning was appropriate.

Substantive fairness

41. Genuine labour broking relationships are given legal force by the provisions of section 198 of the Act. It provides, *inter alia*, as follows:

> "**198. Temporary Employment Services.**—(1) In this section, "temporary employment services" means any person who, for reward, procures for or provides to a client other persons—
>
> (*a*)
> who render services to, or perform work for, the client; and
>
> (*b*)
> who are remunerated by the temporary employment service.
>
> (2) For the purposes of *this Act*, a person whose services have been procured for or provided to a client by a temporary employment service is the *employee* of that temporary employment service, and the temporary employment service is that person's employer.
>
> (3) Despite subsections (1) and (2), a person who is an independent contractor is not an *employee* of a temporary employment service, nor is the temporary employment service the employer of that person.
>
> (4) The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its *employees*, contravenes—
>
> (*a*)
> a *collective agreement* concluded in a *bargaining council* that regulates terms and conditions of employment;
>
> (*b*)
> a binding arbitration award that regulates terms and conditions of employment;
>
> (*c*)
> the *Basic Conditions of Employment Act*; or
>
> (*d*)
> a determination made in terms of the W*age Act"*

42. But for the provisions of this section, the person who renders service could have been regarded as being employed by both the client and the Labour Broker. In some cases, mentioned in subsection 4, the Act makes the client and Labour Broker jointly and severally liable to the employee but not in cases of dismissal. Where the employee is dismissed, the employee's cause of action is only against the Labour Broker and not against the client. These

provisions represent a compromise between labour and management and the legitimacy of such arrangements has accordingly been retained in the section.

43. In this case, the Applicant did not attack the labour broking arrangement on the basis that it was a sham and that the client was in fact the true employer. Indeed, there is no evidence at all to support this finding. I accordingly accept, in this judgment, that the relationship between the Respondent and Nissan was genuine.

See: **LAD Brokers (Pty) Ltd v Mandla** [2001] 9 BLLR 993 (LAC)

Dick v Cozens Recruitment Services [2001] 22 ILJ 276 (CCMA)

44. So as things stand, the employee has no recourse against the client for unfair dismissal claims.

NUM & others v Billard Contractors CC & another [2006] 12 BLLR 91 (LC) at par 79:

> "Section 198 of the Labour Relations Act applies to arrangements of this kind. Parties are entitled to choose to structure their relationships in this way, and they may do so even if the principal purpose is to make the labour broker (and not its client) the person who is responsible for managing employees and ensuring compliance with the various statutes that regulate employment rights. The provisions of section 198(4) make the client jointly and severally liable in respect of contraventions of specifically identified employment rights. Unfair dismissal rights are not among these. Whether or not this is desirable as a matter of policy is not for me to decide in these proceedings, and I express no view on that question here."

45. The facts reveal that both the Applicant and the Respondent were *ad idem* that the misconduct for which the Applicant was accused, justified a final written warning and not dismissal, but that Nissan did not.

46. Mr Beaton stressed the fact that the legislature has given its stamp of approval to the relationship and submitted that there was nothing more the Respondent could do in this case after the client, Nissan, took the stance that it did not want the Applicant on its premises. He submitted further that the Labour Broker in these circumstances was legitimately entitled to invoke section 189 of the Act given the fact that it now had to pay the employee's salary without being able to receive any value for it from the client as the client had acted within its contractual rights to terminate the payment. He relied upon the decision in **Lebowa Platinum Mines Ltd v Hill** [1998] 7 BLLR 666 (LAC) which deals with dismissal/s at the behest of third parties and submitted that the principles set out therein, found application. He submitted that the Respondent had met the requirements of this judgment. He highlighted the fact that the Respondent had very little bargaining power to negotiate with Nissan, who was its biggest client.

47. The premise of the argument really rests upon two pillars: Firstly, that the client was acting lawfully under the terms of the contract when it no longer wished to tolerate the employee's presence on its premises. Secondly, that the Respondent, the Labour Broker, was powerless and could do nothing in response.

48. It seems to me that if these two pillars of the argument are correct, the rest of the argument submitted by Mr Beaton would undoubtedly be right. Moreover, it seems to me that if these submissions are correct, an employee may find that it may be impossible to claim reinstatement. Although the Applicant in this case only sought compensation, this would in my view be the logical consequence if I uphold Mr Beaton's arguments. See **NUMSA obo Ngayi & 6 others v Lapace Construction**, an unreported decision of Commissioner M Marcus MEGA 21381. The decision is distinguishable in one important respect. In that case the client terminated the entire contract with the Labour Broker and not just the contract in relation to one employee. In that case, the learned Commissioner, having to deal with the former scenario, says:

> **"**At the outset of proceedings Mr Xilongo indicated he would seek the reinstatement of the Applicants. I indicated to him that in my view such an order would not be feasible since it was not capable of implementation, in that the labour broker/employee contract is a special category of employment which requires the continued existence of three parties, the employer (broker), the employee assigned by the broker to work for the latter's client, and the client. In my analysis of this legally complex relationship in **Dick v Cozen's Recruitment Services** [2001] 22ILJ 276 CCMA, I categorized the broker as the **de jure** employer and its client as the **de facto** employer, expressing the view that the employment relationship cannot exist without the continued existence of both broker and client inasmuch as the intention of all the parties is that the employee is assigned by the broker to perform work for the broker's client, not the broker. The arrangement does not contemplate the employee offering his labour to the broker in the latter's business, but only in the business of the client to whom he is assigned by the broker. The sequitur is: Remove the client from the equation and the employee's employment with the broker in terms of section 198 (1) and (2) of the Act falls away, since you have removed the **de facto** employment which is the source of the employee's work and remuneration. In short, the employee's employment with the broker cannot continue (or exist, in my view) without a client to whom the employee is assigned by the broker to work. This intention is reflected in the definition of employer and employee found in section 198 (2) of the Act which reads as follows: "For the purposes of this Act, a person **whose services have been procured for or provided to a client** (my emphasis) by a temporary employment service (that is, Labour Broker)

is the employee of that temporary employment service, and the temporary employment service is that person's employer ". Inasmuch as Applicants` services have at this time or subsequent to their dismissals not been provided to the client (Babcock) by Respondent, it is not physically or legally possible to reinstate them in the employment of the Respondent. It was never contemplated in the employment contract between Applicants and Respondent that Applicants would perform work for the Respondent in its labour broking undertaking. Hence my conclusion as conveyed to Mr Xilongo at the outset of this matter that it is not feasible to order Applicants` reinstatement in the employment of the broker (Respondent). In the alternative, Mr Xilongo asks that Applicants be awarded substantial compensation for the period of their unemployment following their unfair dismissal by Respondent."

49. I propose to examine these two pillars of Mr Beaton's argument more fully.

50. In so doing, I am mindful of the fact that the relationship between the Respondent and Nissan was a lawful one. I am also mindful of the fact that I am not dealing with the situation where the client cancels the entire contract with the labour broker on grounds which are lawful.

51. I make a distinction, however, between the legality of the relationship on the one hand, compared to the terms of the contract on the other. While the relationship may be a lawful one, not all of its terms may be.

The contractual argument

52. In **Barkhuizen v Napier** 2007 [7] BCLR 691 (CC) the Court stated:

> "What then is the proper approach of constitutional challenges to contractual terms where both parties are private parties? Different considerations may apply to certain contracts where the State is a party. This does not arise in this case.
>
> [28]

> Ordinarily, constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it.11 Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms,12 and the rule of law.13 And the Bill of Rights, as the Constitution proclaims, "is a cornerstone" of that democracy; "it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom."14
>
> [29]
> What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.
>
> [30]
> In my view, the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them. It follows therefore, that the approach that was followed by the High Court is not the proper approach to adjudicating the constitutionality of contractual terms."

53. Public policy imports the notions of fairness, justice and reasonableness. Public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair. Public policy, it should be recalled *"is the general sense of justice of the community, the boni mores, manifested in public opinion."*

54. As has been observed further, in the judgment, "*while public policy endorses the freedom of contract, it nevertheless recognises the need to do simple justice between the contracting parties. To hold that a Court would be powerless in these circumstances would be to suggest that the hands of justice can be tied; in my view, the hands of justice can never be tied under our Constitutional Orde*r."

55. At p.351 Moseneke DCJ said:

> "Public policy cannot be determined at the behest of the idiosyncrasies of individual contracting parties. If it were so, the determination of public policy would be held ransom by the infinite variations to be found in any set of contracting parties. In effect, on the subjective approach that the majority judgment favours, identical stipulations could be good or bad in a manner that renders whimsical the reasonableness standard of public policy"

56. In **Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff & another** [2009] 3 SA 78 (C) the Court stressed the importance of being vigilant when private power is abused. The Court said:

> "In our country, there should be no need to remind the legal community of the importance of power and its abuse, even when sourced in private hands. By contrast, see the mischaracterisation of the law fashioned by private power at paragraph [30] of *Den Braven*.
>
> Private power in South Africa is also accountable to the principles of the Constitution. Madala J reminds us of this important point of our history when he wrote in *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) [also reported at 1996 (5) BCLR 658 (CC)–Ed] at paragraph [163]:
>
> > "Ours is a multiracial, multi-cultural, multi-legal society in which the ravages of apartheid disadvantage and inequality are just immeasurable. The extent of the oppressive measures in South Africa was not confined to government/individual relations, but equally to individual/individual relations. In its effort to create a new order, our Constitution must have been intended to address these oppressive and undemocratic practices at all levels. In my view our Constitution starts at the lowest level and attempts to reach the furthest in its endeavours to restructure the dynamics in a previously racist society."

57. In **SA Post Office v Mampeule** [2009] 30 ILJ 664(LC), the Court in a similar manner considered that contractual rights cannot be structured in a way which would undermine the fundamental protections guaranteed to employees by the Act. The Court said:

> "The respondent's counsel says if it were permissible, then the entire provisions of chapter 8 of the LRA, and the constitutional right to fair labour practices, could be

> easily circumvented. This could be achieved, so the argument goes, by including a clause in every employee's contract that his employment will terminate automatically on the occurrence of some or other event, for example, a prescribed act of misconduct or incapacity. There is much to be said for this submission. Such clauses are eminently undesirable in the labour relations context. The progressive disciplinary measures for which schedule 8 to the LRA makes provision would be rendered otiose and the labour relations clock in this country would have been turned back some three decades."

58. Labour broking arrangements affect three parties: the client, the broker and the employee. As this case shows, it is almost inevitable in the way the relationship is structured that the client will wield the most bargaining power and gets the best end of the deal. The Labour Broker is in the middle. The Labour Broker gets paid for procuring the labour and earns a profit but, as this case shows, the Labour Broker is the one liable in the case of an unfairly retrenched employee. The employee, however, may claim statutory severance pay from both.

59. In this tripartite arrangement, employees are the weakest and most vulnerable.

60. Although I have found and accepted that the arrangement itself has been given the stamp of approval by organised labour, management and the legislature, this does not mean that the Labour Broker and the client are at liberty to structure their contractual relationships in a way that would effectively treat employees as commodities to be passed on and traded at the whims and fancies of the client.

61. Nor does it mean that Labour Brokers and clients may structure their contractual relationship in a way that would undermine the employee's constitutionally guaranteed right to fair labour practices.

62. The judgment of the Namibian Supreme Court in **Africa Personnel Services (Pty) Ltd v Government of The Republic of Namibia** SA 51/2008, unreported is instructive and recognises the need to monitor potential abuses in the labour broking arrangement without altogether prohibiting it. The Court in that case was concerned with the constitutionality of prohibiting labour broking arrangements. The Court held that an absolute prohibition is unjustified because of the right to free trade, the needs for flexibility which Labour Brokers cater for in a dynamic market and the importance of freedom of contract. The Court, however, recognised the need to strike a balance between the interests of employers to have labour broking arrangements protected on the one hand, compared to the interest of workers not to be treated as commodities because of the way the relationship is carried out. The Court said after referring to the **ILO Private Employment Agencies Convention,** C181, 1997, as follows:

> "We have discussed the principle that "labour is not a commodity" earlier in this judgment and pointed out that, unlike a commodity, it may not be bought or sold on the market without regard to the inseparable connection it has to the rights and human character of the individual who produces it. We emphasised the importance of labour legislation in bringing about social justice at the workplace; to redress bargaining imbalances between employers and employees and to protect employees, especially those who are most vulnerable, against exploitation. The numerous regulative requirements proposed in the Convention are intended to ensure that the labour of agency workers is not treated as a commodity and that their human and social rights as workers are respected and protected in the same respects as the protection accorded in labour legislation to employees in standard employment relationships. It is self-evident from a reading of the text as captured in the summary above that the purpose of the Convention is to create a framework within which private employment agencies may operate and, at the same time, to ensure that workers using their services are protected. If the proposed regulative framework for the protection of the workers and their rights is put in place by member States and it is supervised and enforced, it would not allow for the labour of agency workers rendered within its protective social structure to be treated like

> a commodity. This is so, not only because their engagement by agency service providers and placement with agency clients are subject to their consent, but also because the social protection provided for in those regulative measures, which is inseparably attached to their person and labour, is by legal implication part of the terms and conditions of the triadic employment relationships which arise as a consequence. Had that not been so, then the adoption of the Convention by the ILO would be in conflict with one of the most basic principles upon which it was founded. The terms of the Convention do not give us reason to suggest such a conflict. It follows that we do not accept the respondents' contention that agency work cannot be regulated because it is per se inimical to the first principle of the Philadelphia Declaration and therefore, albeit indirectly, also at odds with Article 95(d) of the Constitution."

63. The Constitution provides that everyone and not just employees have a right to fair labour practices. Consequently, even though a person may not be regarded by the law as an employee of the client but of the Labour Broker, the client still has a legal duty to do nothing to undermine an employee's right to fair labour practices unless the limitation is justified by national legislation.

64. There is nothing in the text of section 198 of the Act that indicates to me that a Labour Broker and a client may limit the right of an employee not to be unfairly dismissed.

65. It must be recalled that this right exists primarily to guarantee security of employment. (See **Sidumo & another v Rustenburg Platinum Mines Ltd & others** [2007] 12 BLLR 1097 (CC)). If Labour Brokers and clients are given the licence to contract for standards that are less than the fundamentals guaranteed, the right to security of employment of employees involved in this tripartite relationship will be severely undermined.

66. In applying the right not to be unfairly dismissed, a Court is not bound by contractual limitations created by parties through an agreement when the agreement conflicts with the fundamental rights of workers.

67. The Courts especially have a duty not to perpetuate wrongs exercised by private parties who wield great bargaining power.

68. In **Volvo (Southern Africa) (Pty) Ltd v Yssel** [2010] 2 BLLR 128 (SCA), the client sued the employee on the basis that the employee owed to the client a fiduciary duty, notwithstanding the fact that the employee was employed by the Labour Broker:

> "Yssel occupied the most senior position in Volvo's information technology division. That there was no contractual privity between him and Volvo seems to me to be of little consequence. It was the position to which he was appointed, rather than the nature of the contractual relationship, that defined what Volvo could expect of him. He had not been brought in to its offices so as to provide him with an opportunity to hawk his own wares but had been brought there in the interests of Volvo.
>
> That his functions might not have included recruiting, employing and acquiring staff does not seem to me to be material. No doubt he could not be compelled to accept instructions to engage himself in matters of that nature. But the fact is that he did engage himself in arranging matters between Volvo and its staff. And in doing so, he did not purport to be doing so as a stranger who was conducting his own affairs. He did so as an incident of his function as manager of the division. Indeed, there can be no doubt that Yssel was well aware that it was precisely because he was the manager of the division that Volvo could be induced to "relax the care and vigilance it would and should have ordinarily exercised in dealing with a stranger."[8]
>
> [20]
> Yssel was well aware that Van Eeden had made no independent enquiries relating to the arrangement with Highveld and was acting entirely upon what she was told by him. That he found it necessary to secure an agreement of secrecy from Pieterse makes it abundantly clear that he was well aware that Van Eeden believed that he was arranging matters pursuant to his ordinary managerial duties and not for his own account. In short, he was well aware that Van Eeden did not consider herself to be dealing at arm's length with an independent broker who was arranging matters on his own account, but was dealing with the manager of the division concerned. It was only because Yssel was the manager that the transaction came about at all. I have no doubt that Yssel was in a position of trust when he engaged himself in the matter and was not entitled to allow his own interests to prevail over those of Volvo. He is obliged in those circumstances to disgorge his secret commissions and the appeal must succeed."

69. It seems to me that by a parity of reasoning, if the Courts could recognise that the employee owed a fiduciary duty to the client of a Labour Broker, the Court should also recognise that the client must structure its affairs with due regard to the employee's rights to fair labour practices.

70. Accordingly, any clause in a contract between a Labour Broker and a client which allows a client to undermine the right not to be unfairly dismissed, would in my view be against public policy.

71. It is axiomatic that an employer should not be allowed to invoke such a clause to justify a dismissal for operational requirements.

72. An illegal demand can never found the basis to justify a dismissal based on operational requirements just as it cannot form the basis of a lawful strike. (**TSI Holdings (Pty) Ltd & others v NUMSA & others** [2006] 7 BLLR 631 (LAC)). By the same token section 189 of the Act cannot be used to disguise the true reason for dismissal.

See: **CWIU & others v Latex Surgical Products (Pty) Ltd** [2006] 2 BLLR 14 (LAC)

Perumal & another v Tiger Brands [2008] 1 BLLR 58 (LC)

Oosthuizen v Telkom SA Ltd [2007] 11 BLLR 1013 (LAC)

73. It is axiomatic, however, that where the demand of the client for the removal of the employee is lawful and fair the employer Labour Broker may properly rely upon the provisions of section 189 of the Act.

The Brokers right of recourse against the client

74. It is clear from section 198 of the Act that an employee has no right of recourse against a client of a Labour Broker for unfair dismissal claims.

75. The legislature has, however, placed the burden of satisfying unfair dismissal claims in cases like this, on the Labour Broker. That is part of the compromise inherent in the section. As the constitutional validity of this compromise has not been challenged, I do not express any opinion about it. I have dealt with this aspect earlier.

76. But the Act is silent about the rights of the Labour Broker against the client.

77. It follows from what I have stated above, especially in the **Barkhuisen** and **Mozart Ice Cream Parlour** cases that I have referred to earlier, that the Labour Broker is in fact not powerless to resist its client's attempt to wield its bargaining power in a way which undermines the fundamental rights of employees. The Labour Broker is entitled to approach a Court of law to compel the client not to insist upon the removal of an employee where no fair grounds exist for that employee to be removed. The Labour Broker is also entitled to resist any attempt by the client to enforce a contractual provision which is against public policy.

78. Similarly, if a Court were to reinstate an employee into the employ of the Labour Broker, the Labour Broker may enforce such an Order against the client to give effect to the employee's rights to fair labour practices.

79. In my view, the Labour Broker could in such a case approach either the High Court or the Labour Court for appropriate relief. The fact that the dispute in such an event would be between two parties to a contractual relationship,

which is not an employment relationship, would not mean that the Labour Court could not grant appropriate relief to a Labour Broker if the issue in dispute concerns the employee's rights not to be unfairly dismissed.

80. In terms of the judgment in **Gcaba v Minister for Safety and Security & others** [2009] 12 BLLR 1145 (CC) this Court is entitled under section 157 to develop its jurisdiction to give effect to the Act. The court held as follows:

> "Section 157(2) confirms that the Labour Court has concurrent jurisdiction with the High Court in relation to alleged or threatened violations of fundamental rights entrenched in Chapter 2 of the Constitution and arising from employment and labour relations, any dispute over the constitutionality of any executive or administrative act or conduct by the state in its capacity as employer and the application of any law for the administration of which the minister is responsible.111 The purpose of this provision is to extend the jurisdiction of the Labour Court to disputes concerning the alleged violation of any right entrenched in the Bill of Rights which arise from employment and labour relations, rather than to restrict or extend the jurisdiction of the High Court. In doing so, section 157(2) has brought employment and labour relations disputes that arise from the violation of any right in the Bill of Rights within the reach of the Labour Court. This power of the Labour Court is essential to its role as a specialist court that is charged with the responsibility to develop a coherent and evolving employment and labour relations jurisprudence. Section 157(2) enhances the ability of the Labour Court to perform such a role.112
>
> Therefore, section 157(2) should not be understood to extend the jurisdiction of the High Court to determine issues which (as contemplated by section 157(1)) have been expressly conferred upon the Labour Court by the LRA. Rather, it should be interpreted to mean that the Labour Court will be able to determine constitutional issues which arise before it, in the specific jurisdictional areas which have been created for it by the LRA, and which are covered by section 157(2) (a), (b) and (c)."

81. The failure to recognise such a right of recourse will render the primary remedy for a dismissed worker, namely reinstatement, altogether illusory. In order to fulfil the Acts stated objective to promote social justice it is necessary to recognise a right of recourse.

82. If the Courts do not recognise the Labour Broker's right of recourse, the consequences would be that an employee may find himself without a job for reasons which otherwise would be unfair.

83. It would also mean that the entire purpose of section 189 of the Act whose primary purpose is not to find alternatives or even to hand out severance packages, but to save jobs would be left unfulfilled , in the context of labour broking arrangements, without giving effect to the need to protect security of employment within the tripartite arrangement. To read the Act in the way the Respondent argues would, in my view, mean that the employee, in the situation of the Applicant, receives only secondary protections such as the payment of severance benefits, under section 189. The primary protection of saving jobs is nullified.

84. Accordingly, on the facts of this case, I find that the client's insistence that the Applicant be removed was unlawful and a breach of the Applicant's right to fair labour practises. The Applicant did not commit an offence for which dismissal was justified. The client had no right to insist upon the application of its own internal policies concerning offensive emails because if it wanted that to apply, it should have employed the employee. It seems to me that the client's insistence that its policies apply contradicted the very structure of the relationship. The client had no right to impose its employment policies on the Labour Broker, where the application of those policies conflicted with the right not to be unfairly dismissed.

85. Furthermore, insofar as the contract between the Respondent and its client allowed the client to arbitrarily require the removal of an employee from its

premises, such provision was unlawful and against public policy as it took no account of the right of the employee not to be unfairly dismissed.

86. The Respondent Labour Broker could have accordingly resisted the client's attempts to invoke clauses in its contract with the client which undermined the Applicant's rights. It was unfair of it not to do so before invoking its right to terminate the contract of employment for operational requirements and also because the demand of the client was unlawful and unfair.

87. Mr Beaton relied upon the **Lebowa Platinum judgement**. In **Lebowa's** case, the Court dealt with a dismissal of an employee after the Union threatened to go out on strike if the employer did not dismiss the employee for making a racist comment. The employer had no role whatsoever to play in the making of the racist comment. The facts are not entirely the same because in the present case, the Labour Broker voluntarily entered into a contractual relationship with the client without ensuring that its employee's security of employment is guaranteed in a way which is consistent with the right to fair labour practices. Moreover, in this case Nissan did not demand the Applicant's dismissal, but rather that the Respondent ensure that he be removed from Nissan's premises. The effect of the demand in this case was probably the same as a demand that the employee be dismissed, as no alternatives were available. The findings that I have reached are nevertheless consistent with the **Lebowa decision**. In this case, the Court said:

> "The mere fact that a third party demands the dismissal of an employee would not render such dismissal fair. Such an approach would indeed open a veritable Pandora's Box of injustices.
>
> The demand for the employee's dismissal must usually enjoy a good and sufficient foundation. Where it impinges upon the fundamental rights of the employee in terms

of the Constitution special considerations need to be taken into account in determining whether it enjoys such a foundation."

88. The case of **Mnguni v Imperial Truck Systems(Pty)Ltd t/a Imperial Distribution** [2002] 23 ILJ 492 (LC) is instructive. The facts in that case were very similar to the present one. The employer rendered distribution services to various clients at the client's premises. One of the client's alleged that the employee had stolen its goods. The employee was however innocent. The client demanded the employee's removal from its premises. The employer obliged and after finding no alternatives retrenched the employee. The Court held this to be unfair. It held that the employer had to take all reasonable steps to persuade its client to drop the request. The Court also found that there was no proof that the client would have cancelled the contract had the employer insisted that it allow the employee to continue working. These criticisms apply with equal force to the respondent (**See too**: **Buthelezi & others v Labour for Africa (Pty)Ltd** [1991] 12 ILJ 588 (IC)). Furthermore, the right of the Labour Broker to request the client to drop its demand extends further to any demand which infringes the employee's right to fair labour practices and which cannot be justified. As indicated above, the Labour Broker has the right to approach a competent Court for appropriate relief in such a case.

89. The concerns expressed by Commissioner Marcus in the **Lapace Construction judgment** *supra* are valid concerns especially in cases where the client cancels the entire contract with the Labour Broker. But it seems to me that once it is recognised that the Labour Broker has a right of recourse against the client, the in principle difficulties with reinstatement, may in appropriate circumstances, fall away. There may be civil procedure inconveniences to give effect to this right of recourse, but the law caters for those issues by allowing a respondent Labour Broker for example to issue a third party notice if the facts and issues are the same. Or even the Applicant, employee to join an interested party, the client, where reinstatement is claimed. As I have mentioned, a Labour Broker may avoid a dismissal altogether if it acts expeditiously and refuses to comply with the client's requests. A Court of law may grant a *mandamus* against the client in order to enable the employee to continue working.

90. In the **LAD Labour Broker's case** *supra,* the Labour Appeal Court simply gave effect to section 198 by holding that the Labour Broker was liable to the employee in respect of the employee's unfair dismissal claim. The Court did not have to examine the validity of the demand by the client.

91. Similarly, the decision **in State Information Technology Agency (SITA) (Pty)Ltd v CCMA & others** [2008] 7 BLLR 611 (LAC))is distinguishable because on the facts of that case the court found that section 198 did not apply as the SITA was the true employer.

92. In **Sindane v Prestige Cleaning Services** [2009] 12 BLLR 1249 (LC) the Court adopted a different approach to the one adopted in this judgment. The

Court dealt with the situation where one of the respondent's clients scaled down its cleaning requirements, and the services of the applicant and a colleague were terminated. Here, there was perhaps a genuine economic reason, as the court ultimately found, and section 189 could have been suitably applied. The employee claimed that he had been unfairly dismissed for the respondent's operational requirements. The respondent claimed that his services had terminated according to the terms of his fixed-term contract, which provided that it would last only while the client required his services, and denied that the applicant had been dismissed. The Court agreed with this submission. Although the facts of this case are distinguishable from the present case, because dismissal is not what is in issue, it seems to me that this approach gives far too much emphasis to the rights of parties to contract out of the Act. It seems to me that this approach violates section 5(2) of the Act because it prevented the employee from exercising the rights under section 189 of the Act.

Procedural Fairness

93. Mr Levin submitted that the consultation process was too short, that it was not *bona fide* and that the section 189(a) notice was vague and led to unfairness. He emphasised that the Respondent did not seriously make any effort to accommodate the employee in another position and did not disclose sufficient information regarding alternative available posts. He submitted that the Respondent did not seriously make any effort to change the timing of the dismissal, to assist the Applicant or to discuss the issue of severance.

94. In assessing the procedural fairness of the dismissal, it must be borne in mind that there were no genuine factual disputes between the parties. The facts leading up to the Applicant's retrenchment were mostly common cause.

See too: **Ngutshane v Ariviakom (Pty) Ltd t/a Arivia.kom & others** [2009] 6 BLLR 541 (LC) at para 30

95. For this reason, I cannot find any unfairness to have occurred in consequence of the fact that the section 189(a) notice was at places unclear because parts of it were cut and pasted from a precedent. On the whole, the notice identified clearly the reason for the proposed retrenchment and the other issues were sufficiently clear for the Applicant to understand them. The purpose of the section 189(a) notice was fulfilled and there was substantial compliance with the section (**Visser v Sanlam** [2001] 3 BLLR 313 (LAC)).

96. Furthermore, because the facts were mostly common cause, there was no point in prolonging a consultation process for the sake of it as nothing constructive could be achieved by doing that. One meeting to discuss all the required issues with an open mind and with a view to reaching consensus, is sufficient. Only one employee was affected.

97. The Applicant made no proposal about changing the timing of the dismissal. Given the fact that the Respondent was not being reimbursed any funds by the client after September 2006, it was not unfair for it to change the timing of the dismissal any further. As

mentioned, the Applicant suffered no harm as a result of the timing of the dismissal because he immediately found a job at a higher salary.

98. For the same reasons, the failure on the Respondent's part to make a more generous severance package proposal was not unfair. Again, the Applicant made no proposals whatsoever on this issue.

99. The one proposal that the Applicant did make, namely to be swapped, was seriously considered but as I have found, it was not feasible. Even at the trial, the Applicant could not identify the position he was talking about. Nor did the evidence show that the Respondent withheld relevant information regarding alternative posts.

100. I am satisfied that the Respondent approached all the issues with an open mind and accordingly I find that the meeting satisfied the requirement of section 189.

101. The dismissal was accordingly procedurally fair.

Compensation

102. I have found that the dismissal was substantively unfair.

103. There are two stages to the enquiry. The first is to decide if compensation must be granted. If so, the next is to decide the quantum thereof.

104. The principles have now been clearly set out in **Dr D.C Kemp t/a Centralmed v Rawlins** [2009] 11 BLLR 1027 (LAC):

> "There are many factors that are relevant to the question whether the court should or should not order the employer to pay compensation. It would be both impractical as well as undesirable to attempt an exhaustive list of such factors. However, some of the relevant factors may be given. They are:
>
> (a)
> the nature of the reason for dismissal; where the reason for the dismissal is one that renders the dismissal automatically unfair such as race, colour, union membership, that reason would count more in favour of compensation being awarded than would be the case with a reason for dismissal that does not render the dismissal automatically unfair; accordingly, it would be more difficult to interfere with the decision to award compensation in such case than otherwise would be the case;
>
> (b)
> whether the unfairness of the dismissal is on substantive or procedural grounds or both substantive and procedural grounds; obviously it counts more in favour of awarding compensation as against not awarding compensation at all that the dismissal is both substantively and procedurally unfair than is the case if it is only substantively unfair, or, even lesser, if it is only procedurally unfair;
>
> (c)
> in so far as the dismissal is procedurally unfair, the nature and extent of the deviation from the procedural requirements; the minor the employer's deviation from what was procedurally required, the greater the chances are that the court or arbitrator may justifiably refuse to award compensation; obviously, the more serious the employer's deviation from what was procedurally required, the stronger the case is for the awarding of compensation;
>
> (d)
> in so far as the reason for dismissal is misconduct, whether or not the employee was guilty or innocent of the misconduct; if he was guilty, whether such misconduct was in the circumstances of the case not sufficient to constitute a fair reason for the dismissal;
>
> (e)
> the consequences to the parties if compensation is awarded and the consequences to the parties if compensation is not awarded;
>
> (f)
> the need for the courts, generally speaking, to provide a remedy where a wrong has been committed against a party to litigation but also the need to acknowledge that there are cases where no remedy should be provided despite a wrong having been committed even though these should not be frequent;
>
> (g)
> in so far as the employee may have done something wrong which gave rise to his dismissal but which has been found not to have been sufficient to warrant dismissal, the impact of such conduct of the employee upon the employer or its operations or business; and
>
> (h)
> any conduct by either party that promotes or undermines any of the objects of the Act, for example, effective resolution of disputes.
>
> [21]

> From the above it is clear that in the case of a narrow discretion – that is, a situation where the tribunal or court has available to it a number of courses from which to choose – its decision can only be interfered with by a court of appeal on very limited grounds such as where the tribunal or court:
>
> (a)
> did not exercise a judicial discretion; or
>
> (b)
> exercised its discretion capriciously; or
>
> (c)
> exercised its discretion upon a wrong principle; or
>
> (d)
> has not brought its unbiased judgment to bear on the question; or
>
> (e)
> has not acted for substantial reasons (see *Ex parte Neethling & others* 1951 (4) SA 331 (A) at 335); or
>
> (f)
> has misconducted itself on the facts (Constitutional Court judgment in the *National Coalition for Gay & Lesbian Equality* case at paragraph 11); or
>
> (g)
> reached a decision in which the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles (Constitutional Court judgment in *National Coalition for Gay & Lesbian Equality* at paragraph 11).
>
> Although the principle is that the exercise of a true discretion by a court of first instance or by a tribunal can only be interfered with by an appeal court on limited grounds, the list of those grounds on which interference is permissible is not so short any more as can be seen above.
>
> [22]
> I do not think that the provisions of section 193(1)(c) of the Act give the Labour Court or an arbitrator the kind of power which would enable it or him to grant or refuse an order of compensation on identical facts as it or he sees fit. In my view, the ultimate question that the Labour Court or an arbitrator has to answer in order to determine whether compensation should or should not be granted is: which one of the two options would better meet the requirements of fairness having regard to all the circumstances of this case? If however the court or arbitrator answers that the requirements of fairness, when regard is had to all of the circumstances, will be better met by denying the employee compensation, no order of payment of compensation should be made. If the court or arbitrator answers that the requirements of fairness will be better met by awarding the employee compensation, then compensation should be awarded."

105. In **Lakomski v TTS Tool Tecnic Systems (Pty) Ltd** [2007] (28 ILJ 2775 (LC), the Court recognised the principle that the fact that an employee suffered no financial harm is not a bar to the granting of compensation. The test is not whether the employee suffered patrimonial loss but whether it is just an equitable to grant compensation in these circumstances. Patrimonial

loss is a factor to be considered though it is not absolute. In that case five months compensation was awarded for a dismissal that was both substantively and procedurally unfair.

106. I have decided to exercise my discretion to grant compensation. I have decided to award compensation because a retrenchment is a no fault dismissal. I am of the view that the Applicant should not be left remediless because his dismissal was unfair. As I have stated, the Respondent did not make any tender to him at any time. As such the case of **Rawlins** is distinguishable from the present matter. I am also of the view that it is necessary to send a clear message to Labour Brokers not to simply accede to the demands of their clients when such demands conflict with their employees' rights to job security because such demands are unfair.

107. In consequence of the fact that the Applicant suffered no financial loss, I can only award nominal compensation. I have decided to award a sum of R16 571.98 (one month) to the Applicant as just and equitable compensation for the substantively unfair dismissal. The employer acted unlawfully and unfairly but it was in my view *bona fide*. The employee would be unfairly enriched by a higher amount. The Respondent conceded that in the event that the dismissal was found to be substantively unfair this amount would be just and equitable as compensation to the employee.

Costs

108. The Respondent did not make any tender of compensation to the Applicant. He was entitled accordingly to pursue his claim.

109. Not to award costs in this matter would be unfair because it would nullify the order of Compensation.

110. In my view, justice requires that costs should follow the result.

Order

111. The dismissal of the Applicant is substantively unfair but procedurally fair.

112. The Respondent is ordered to pay the Applicant a sum of R16 571.98 (sixteen thousand five hundred and seventy one rands and ninety eight cents) as compensation.

113. The Respondent is ordered to pay the Applicant's costs.

F.A BODA

ACTING JUDGE LABOUR COURT

10 March 2010

For Applicant : Mr Clifford Levin (Attorney)

Instructed by: Clifford Levin Attorneys

For Respondent Adv R Beaton

Instructed by: Vogel Malan Attorneys