VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

DATE: 20 APRIL 1998 CASE NO. J1034/97

In the matter between:

MANNING, R Applicant

and

METRO NISSAN – A DIVISION OF VENTURE MOTOR HOLDINGS LTD. First respondent

MALBARK CONSUMER PRODUCTS (PTY) LTD Second respondent

J U D G M E N T

WAGLAY,AJ:

[1] The applicant, Mr R Manning, was dismissed for operational reasons (retrenched) in terms of a letter dated 5 September 1997 served upon him the on 8 September 1997. The applicant was retrenched with effect from 8 September 1997 and contends that his dismissal for operational reasons was both substantively and procedurally unfair.

[2] The applicant cited METRO NISSAN : A DIVISION OF VENTURE MOTOR HOLDINGS LIMITED as the first respondent and MALBARK CONSUMER PRODUCTS (PTY) LTD as the second respondent. In his statement of case applicant alleged
that his unfair dismissal was effected by the first respondent which is a business enterprise and which business was subsequently sold to the second respondent as a going concern. Consequently if any order is made in favour of the applicant

this should be enforceable as against the second respondent.

[3] It was common cause that the applicant was employed by the first respondent on 27 May 1996 as a principal dealer and was dismissed by it on 8 September 1997. In terms of section 188 of the Labour Relations Act of 1995 ("the Act") the onus is upon the respondents to satisfy this court that the reason for the applicant's dismissal was a fair reason based on its operational requirement and that such dismissal was affected in accordance with fair procedure.

[4] The respondents led two witnesses. Its first witness Lewis, who I may mention is no longer in the first respondent's employ nor in the employ of second respondent, stated that he was brought into the first respondent's operation from another subsidiary of the first respondent's parent company to assist the Divisional Director of the first respondent to salvage the first respondent which was in a financial mess. It appeared from his evidence that the losses being incurred by the first respondent were accumulating monthly.

[5] Lewis on moving to the first respondent immediately conducted a performance review which he recorded in writing and handed it to the applicant. The applicant as the principal dealer was in charge of the day to day business operation of two of the first respondent's business operations. There was also a third business operation which was suffering similar financial crisis. In the final three paragraphs of the performance review letter dated 11 June 1977 Lewis stated the following:

"The above performance is clearly not acceptable. This operation requires a detailed recovery plan to bring it into profit within the first three trading months of the new

financial year. We need to set specific objectives to achieve this. Our minimum requirements are as follows for the first quarter of the new financial year:

a) July ...

b) August ...

c) September ...

"The above agreed targets will be managed on a monthly basis. This three months window of opportunity is in the belief that you can achieve good returns. Non-achievement will compel us into a stronger course of action."

"The division is in a critical state and the magnitude of the problem must not be taken lightly. You have my full support in you achieving the agreed targets."

[6] He further stated that he was in continuous contact with the applicant after 11 June 1997. Despite attempts to salvage the business the business not only failed to meet the targets set but the losses continued to accumulate. In order to stem the losses the Board of the first respondent decided that the only option open to it was to restructure the first respondent and reduce its three operations to two and look into eliminating the upper tier of management which consists of two principal dealers, as well as retrenching some of the other employees.

[7] According to him the decision to restructure and embark on a retrenchment exercise was not taken lightly. This decision was only taken towards the end of August when it became clear that there was no prospect of first respondent turning the tide from being a loss making business venture to a business which could succeed in at least "cutting even".

[8] After the Board had agreed to embark on the restructuring and retrenchment exercise Lewis wrote to all of the staff of the first respondent on 22 and 25 August 1997. This letter which was headed "NOTIFICATION OF POSSIBLE REDUNDANCIES/RETRENCHMENTS – METRO NISSAN GROUP" informed all employees that the first respondent was starting the consultation process as is required by section 189 of the Act in order to give effect to the first respondent's decision to retrench some of its staff.

[9] Applicant also received this letter and was present at a meeting held on 25 August 1997 at which meeting Lewis explained the reason for the restructuring of First Respondent and the possible retrenchment/redundancies that may result therefrom. According to Lewis at this meeting employees were told, as they were in the letter of 22 and 25 August, that they were "welcome to interface with management on this matter".

[10] While a number of employees did meet him about their positions, applicant did not. On 28 August a further letter was sent to all staff stating that he would be consulting with them in the first two days of September 1997.

[11] On 1 September 1997 he met the applicant and consulted with him for approximately two hours. This consultation was recorded and a copy of the minutes was handed to court. The applicant admitted that the minute was a fair reflection of what transpired at this meeting.

[12] Some of the discussions that took place at this meeting were the following:
"ML asked if RM thought there was a place for three managers at

the top. RM said there is only place for one and if he had to vote he would vote for himself."

"ML asked how RM would feel about the possibility of a change in job title and status. RM said he will consider it... RM doesn't feel a status change was warranted though".

"ML asked RM where he sees himself in the new organisation. RM replied as ML's right hand man. He can slot in anywhere in the organisation and especially liaise with fleet customers and Nissan."
(ML and RM refers to Lewis and the applicant respectively and reference to managers was a reference to principal dealers).

[13] Lewis further stated that at this meeting he formed a definite opinion that despite applicant's statement that he would "consider" a change in status applicant would not agree thereto.

[14] He reported his discussions with the applicant to the Board which considered what the applicant had to say and after intense discussion arrived at the view that the applicant could not be accommodated and had to be retrenched.

[15] On 5 September 1997 he then drew the letter to applicant informing him that he was to be retrenched as and from 8 September 1997. This letter he handed to the applicant on 8 September 1997 at which time he discussed the matter with the applicant and informed him why first respondent could not retain the applicant's services.

[16] Bell, the second witness for the respondents, confirmed that he was the divisional director of the first respondent with

overall responsibility. He had employed the applicant in the hope that applicant with his years of experience could inject some confidence in the business operation which was "not doing too well".

[17] When the business began to deteriorate and losses accumulate, he brought in Lewis from another subsidiary of the parent company to assist him to stem the haemorrhage the business was undergoing.

[18] He met Lewis on a continual basis to evaluate what progress, if any, was being made to reduce losses that were being incurred by the first respondent.

[19] By middle August, according to him, it became clear that there was no hope, as the operations were presently structured, from changing the operation from one of making losses to one that would generate any profits.

[20] He stated that Lewis, and the financial director of the First respondent and he held a number of discussions on how, if at all, they could assist in making the operation viable. Finally sometime before 22 August 1997 they decided that the only option open to them was to restructure the first respondent's operations by reducing them from three to two and to eliminate the position of principal dealers. They even considered whether they could deploy the applicant elsewhere and it was clear that there was in fact no position in which they could slot in the applicant. The applicant therefore had to be retrenched and he asked Lewis to follow the process required (no doubt to achieve the result which they had already decided upon).

[21] His evidence was further that after applicant was retrenched and the business restructured, the losses continued and the new owners of the business then closed down the business in November 1997 but recently decided to revive it again in the restructured form.

[22] The applicant contended that the respondents failed to follow any procedure in affecting his retrenchment, although he admitted the meeting of 1 September 1997, he denied that the meeting took the form of consultations. He said it was merely a discussion which comprised of "what-if" scenarios.

[23] He stated that from the tenor of the discussion on 1 September 1997 it did appear that he was being considered for retrenchment but he was never ever informed that this specifically was the case. In fact when he first met Lewis after receiving the letter of 22 August advising staff of the possibility of retrenchment, he informed Lewis that he had heard rumours that he was going to be retrenched and enquired from Lewis what was his position. Lewis according to him simply responded by stating "I cannot guarantee anything".

[24] The further evidence was that none of the procedural requirements as provided for in terms of section 189 of the Act, save for section 189(1) were met.

[25] Based on the above evidence respondents argued that the dismissal was both substantively and procedurally fair. Counsel for respondent argued that in so far as substantive fairness of the dismissal is concerned, applicant has led no evidence to show that his dismissal was substantively unfair. The evidence

of Lewis and Bell that first respondent could not accommodate applicant in any position whatsoever was never challenged by the applicant. In addition, at the outset of the trial applicant accepted as common cause
that first respondent was in financial difficulties.

[26] Applicant's argument in this respect was that because the respondents failed to follow the procedure prescribed it failed to canvass why the applicant had to be retrenched or that the retrenchment of the applicant was the only avenue open to the applicant. Applicant relied on the decision of Gon AJ in the matter of FAWU and Another v National Sorghum Breweries [1997] (11) BLLR 1410 at 1422G to 1423F where the learned judge remarked –
"In my view the failure to follow a meaningful procedure led to a failure to properly canvass the need or reasons to retrench the individual applicant and thereby to conclude that retrenchment was the only option available"

as also the decision of Basson J in S Chothia v Hall Longmore & Co (Pty) Ltd [1997] (6) BLLR 739 at 744 D–E
when Basson J states:
"Although I am satisfied that the Respondents' financial position necessitated retrenchment (this is, in fact, not contested), I have to be satisfied that the applicant's selection as retrenchee was fair before his dismissal can be substantively fair."

[27] I accept that in order for a dismissal to be substantively fair the employer must "canvass the need and reasons to retrench the individual" affected and therefore there has to be by necessary implication some overlap between the procedural and substantive requirements of fairness. The present case however

is
distinguishable from the above cases in that not only was there a need to retrench, applicant himself conceded in the meeting with Lewis on 1 September that there was no need for his position. I am also obliged to accept the unchallenged evidence of the respondents that it could not accommodate the applicant in any other alternative position. Added thereto the fact the applicant's position was declared redundant and two months later the restructured operation was closed, is clearly demonstrative of the fact that the dismissal of applicant in my view was substantively fair. More importantly the Applicant was aware of the First Respondents predicament and was himself originally employed to address this predicament which he obviously for whatever reason failed or was unable to adequately address.

[28] With regard to whether or not the applicant was dismissed in accordance with fair procedure, section 189 of the Act clearly and unequivocally provides for the steps that an employer is required to follow. This aspect has been dealt with in a number of decision of this court and I do not intend restating the process which the employer is obliged to undertake. See National Union of Metalworkers of South Africa and Others v Comark Holdings (Pty) Ltd [1997] 19 ILJ 516 at 524D-G; CWIU v Johnson & Johnson [1997] 9 BLLR 1186 at 1201J to 1202C and at 1207B to 1208B and FAWU and Another v National Sorghum Breweries [1997] 11 BLLR 1410 at 1422C-D.

[29] Respondents argued to the effect that although section 189 is explicit and detailed it does not require a slavish adherence to every detail. These requirements, so respondents appear to suggest, must be tempered with what is reasonable in the circumstances. I am prepared to accept that there may well be circumstances where it is obvious to an employee that he is the

candidate who has to be retrenched because of his awareness of the facts and circumstances relating to his position. This is particularly so when one is dealing with an employee in the upper echelons of management, as this employee being part of the management structure has knowledge of the employer's needs, requirements, financial standing and its ability to continue to trade on the basis it does, as well as his position in the business structure. In such circumstances to enter into consultations to reach consensus on ways to avoid the dismissal would appear to be quite meaningless but this does not mean that the employer is not obliged to consult and reach consensus on the other requisites provided in section 189, particularly, the timing of the dismissal, ways to mitigate the adverse effect that may result from the dismissal and also the severance pay for the employee to be dismissed. In addition the employer would also be required to comply with sub-sections 189(5) and (6) of the Act.

[30] In this matter even prior to the letters being drafted advising the applicant of the possibility of retrenchment the first respondent had decided that the applicant would be retrenched. Had Lewis in his meeting with the applicant on 1 September 1997 informed the applicant of the decision already arrived at, explained and debated the issue and thereafter dealt with the other requirements of section 189, I might well have arrived at the view that the first respondent and consequently second respondent had in fact complied with section 189. This however is not what transpired.

[31] Lewis only met the applicant once, having regard to the minutes of that meeting what is clear is that the applicant was given the impression that he might be retrenched. There was no discussion of (I) when the respondent would revert to applicant

to respond to the various suggestions made by the applicant; (ii) there was no discussion when the retrenchment would take effect; (iii) there was no discussion on what could be done to mitigate the adverse effect of such dismissal and (iv) there was no discussion on the severance pay that would be paid to the applicant.

[32] In fact after the meeting on 1 September 1997 Lewis simply informed the applicant on 8 September that he was being dismissed with immediate effect. Even if I have to accept that Lewis informed the applicant after handing him the letter of dismissal on 8 September 1997 as to why first respondent rejected some or all of the applicant's suggestions and also explained why the dismissal had to take place with immediate effect as well as the severance package, all of which is denied by the applicant, this does not and could not constitute consultation to reach consensus as provided in Section 189(2)of the Act as the decision to dismiss the applicant had already been made and it was evident that even if applicant at the time made any suggestions these would not be open to debate or discussion in order to attempt to reach consensus.

[33] Furthermore having regard to the fact that the decision to dismiss the applicant was taken even before Lewis informed the applicant about the possibility of retrenchment, the meeting of 1 September 1997 served
nothing more than an attempt to create an impression that there was some compliance with section 189 of the Act.

[34] Although I believe that the applicant's dismissal was substantively fair I am satisfied that there was a total failure by the First Respondent to meet the procedural requirements to

effect a fair dismissal.

[35] Before I consider the appropriate remedy with regard to my findings I need to establish whether the remedy is enforceable against the first or the second respondent or both of them.

[36] The applicant was dismissed by the first respondent on 8 September 1997. Applicant subsequently ascertained that the first respondent was sold to the second respondent as a going concern. In terms of the provisions of section 197 applicant prayed for what can best be termed as a declarator, in terms of which any remedy this court may award as against first respondent could be "executable" against the second respondent.

[37] The only relevant clauses of section 197 as applicable to this matter is sub-sections 197(1)(a); 2(a); (3) and (4). These sub-sections provide as follows:
(1). A contract of employment may not be transferred from one employer (referred to as 'the old employer') to another employer (referred to as 'the new employer') without the employees consent, unless –
(a) the whole or part of a business, trade or undertaking is transferred by the old employer as a going concern; or

(2). (a) If a business, trade or undertaking is transferred in the circumstances referred to in subsection (1)(a), unless otherwise agreed, all the rights and obligations between the old employer and each employee at the time of the transfer continue in force as if they were rights and obligations between the new employer and each employee and, anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer.

3. An agreement contemplated in subsection (2) must be concluded with the appropriate person or body referred to in subsection 189(1).

4. A transfer referred to in subsection (1) does not interrupt the employee's continuity of employment. The employment continues with the new employer as if with the old employer."

[38] In this matter the first respondent was sold to the second respondent in terms of a Memorandum of Agreement signed on 26 September 1997. Paragraph 2.1 specifically provides that the Purchaser purchased the business as a going concern and furthermore the agreement provides in paragraph 16.1 and 16.2 that:

"16.1 Subject to the non-fulfilment of the condition, the Purchaser will have assumed all liabilities, obligations and rights of the Seller in respect of the business as at the effective date ("the employees") and the Purchaser hereby indemnifies and hold harmless the Seller against all claims in respect of such liabilities and obligations. The Purchaser shall be liable for any bonuses, leave pay or other entitlements which may be due to the employees of the business as at the effective date.

16.2 Subject to the non-fulfilment of the condition, all contracts of employment in respect of all employees of the businesses as at the effective date and entered into thereafter (other than the head office employees, it being agreed that such employees do not form part of the businesses) shall be transferred to the Purchaser in accordance with Section 197 of the Labour Relations Act 1995. Such transfer shall not interrupt the continuity of employment of such employees of the

businesses for the purpose of calculating employment benefits and for the purposes of implementing any retrenchment programme by the Purchaser at any time after the
effective date. It is recorded, however, that the Purchaser will not assume any obligations to employees in respect of the post retirement funding of medical aid obligations to:
16.2.1 ... (this is irrelevant for the present purposes)

[39] The effective date of the sale was 1 July 1997.

[40] It is clear for the purposes of the present matter that the applicant who was dismissed on 8 September 1997 was dismissed for all intents and purposes by the second respondent. The fact that the "Deed of Sale" was only signed on 26 September is irrelevant. The only date that is of importance is the effective date as it is from this date that all the rights and obligations are transferred from the seller to the purchaser or from the first respondent to the second respondent. The fact that the effective date predates the conclusion of the agreement is not an unusual or an unacceptable business practice. More importantly, paragraph 16 clearly provides that the contract of employment of each individual member is transferred to the second respondent as and from 1 July. Such transfer, even if not provided for in the agreement of sale would be automatic unless specifically excluded where a business, trade or undertaking is sold as a "going concern".

[41] Having thus decided that the applicant's remedy is as against second respondent, I believe it may be appropriate to make some comments about sections 197(1)(a) and 2(a). What these sections provide for is that whenever a business, trade or undertaking is sold as a going concern the purchaser for all intents and purposes, vis-a-vis the employees of the business, trade or undertaking purchased, puts himself in the place of the

seller. Consequently all the rights and obligations that existed between the seller and its employees are transferred by operation of this section to the purchaser.

[42] For the above to happen, as stated earlier, the purchaser must have purchased the business, trade or undertaking "as a going concern". The term "as a going concern" has been the subject of judicial interpretation. See General Motors SA v Besta Auto Component Manufacturing (Pty) Ltd and Another 1982 (2) SA 653 and the cases dealt with therein. In terms of this decision when a purchaser purchases a business "as a going concern" he is in fact taking over a business, trade or undertaking that is "active and operating" so that the operation may continue if he so desires. This would mean that on the effective date of the sale in so far as the individual employees are concerned the purchaser takes the place of the previous employer and all their rights and obligations that were enforceable against the previous employer automatically are enforceable as against the new employer. If the new employer subsequently decides to close the business, trade or undertaking, restructure it or decides to retrench or dismiss any of the employees who "came" with the business he is obliged in terms of the provisions of the Act to take into account the services of the affected employees not from the date on which he purchased the business but the date which the old employer would have been obliged to take into account had the sale not taken place.

[43] The Act does however make provision in subsection 2(a) of Section 197 for the parties (the seller and the purchaser) to contract out of the consequences of section 197 by the use of the phrase "unless otherwise agreed". This would mean that there would have to be a specific agreement between the

purchaser of a business, trade or undertaking as a going concern, to agree that the contract of individual employee(s) is/are not being transferred to the purchaser. The result of such agreement would mean that the individual employees are being dismissed by the seller in which event the seller will be obliged to comply with the provisions of the Act to ensure that the dismissal(s) are fair both procedurally and substantively.

[44] I now turn to the issue of the appropriate remedy to which the applicant is entitled to based on his dismissal being found to be procedurally unfair. Section 194(1), which is the applicable section, provides:

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

[45] In this matter it is common cause that there has been no delay in initiating or prosecuting the claim by the applicant.

46. The issue I must determine is what is the compensation to which the applicant is entitled. In this regard I am faced with conflicting judgments. In Chothia v Longmore & Co (Pty) Ltd [1997] 6 BLLR 739 (LC) Basson J, in considering what interpretation to attach to section 194 decided that what was crucial was to interpret the meaning of "compensation" in this

section and found that compensation meant "payment of the value, estimated in money, of something lost". Having arrived at that conclusion decided that there is an obligation upon an applicant who is dismissed on the basis of procedural unfairness to prove what losses, if any, he suffered as a result of the employer's failure to effect a procedurally fair dismissal.

[47] Basson J states further at 746B-C that:

"The provisions of section 194 require the amount of compensation awarded to be "equal" or "the equivalent of" the employee's remuneration calculated over a
prescribed period and that these provisions do not say that the compensation is, in fact, the remuneration of the employee calculated over the said period of time. This view has been followed by Revelas J in the unreported case of A Heigers and UPC Retail Services, Case No. J156/97.

[48] Zondo AJ,as he then was, in the case of CWIU v Johnson & Johnson (Pty) Ltd [1997] 9 BLLR 1186 while agreeing with Basson J on what meaning should be attached to the word compensation finds that because of the imperative nature of the language used by the legislative in subsection 194(1) as opposed to the discretion given to the arbitrator or the court in calculating compensation in subsections 194(2) and (3) meant that subsection 194(1) prescribed to the court and the arbitrator to order payment equal to the remuneration the employee would have earned from the date of dismissal to the date of arbitration or adjudication. In this regard he followed the judgment of Maserumule AJ in NUMSA and Others v Precious Metal Chains (Pty) Ltd [1997] 8 BLLR 1068 (LC).

[49] While there is merit in both judgments I think what is crucial in interpreting subsection 194(1) is what was the purpose of this section. In order to do this it is critical to consider sub-sections 194(2) and (3) which provide:

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

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

[50] At the outset one can clearly distinguish between automatically unfair dismissal and other unfair dismissals. When one is dealing with an automatically unfair dismissal this court is given a total discretion to award such compensation that it considers to be "just and equitable" but no more than 24 months remuneration. With regard to the other unfair dismissals the arbitrator or this court is only entitled to exercise its discretion with regard to compensating the employee for an amount in excess of what is provided for in subsection 194(1) but for no more than 12 months remuneration.

[51] What I believe was intended by subsection 194(2) is that once the arbitrator or the court has concluded that a dismissal

was substantively fair there is no reason to enquire upon or decide upon the procedural
fairness of the dismissal. The court and the arbitrator must then decide what compensation it considers to be "just and equitable" but such compensation must not be less than what the employee would have received in terms of subsection 194(1)and not more than an amount equal to 12 months remuneration calculated at the employees rate of remuneration at the time of dismissal.

[52] In the circumstances I must interpose to state that compensatory awards made separately for substantive unfairness and procedural unfairness of a dismissal is clearly wrong. Where a dismissal is found to be substantively unfair under sub-section 194 (2) the compensation that may be awarded cannot be an amount exceeding 12 months and not less then what Section 194 (1) prescribes and procedural unfairness has no place for a separate award.

[53] Having concluded that subsection 194(2) gives the court and the arbitrator a discretion to determine compensation only with regard to an amount exceeding what is provided for in subsection 194(1), I agree with Zondo AJ, as he then was, and Maserumule AJ that section 194(1) is prescriptive. The next question that I must consider is whether this section in fact simply prescribes the payment of remuneration from the date of dismissal to the date of hearing without more. To consider this it is important to ascertain what purpose is section 194(1) trying to achieve.

[54] This section makes it clear that it only applies to dismissal that are found to be procedurally unfair, that is that the employer was not wrong with regard to the decision to dismiss but because he did not follow the procedure he is

obliged to pay the employee the remuneration he (the employee) would have received until the date the arbitration or adjudication is finalised. This would mean that the procedural requirements are concluded with the finalisation of the arbitration or adjudication. The employee is therefore entitled to remain in his or her employ until the finalisation of the matter and as such entitled to receive remuneration until then.

[55] The purpose of section 194(1) is therefore to place the employee in his/her position of employment from the date of his/her dismissal to the date of the arbitration award or judgment of this court.

[56] Accepting that this was the purpose of section 194(1) then it is my view that this subsection implies that an employee dismissed on the basis of procedural unfairness should not profit from such a dismissal. Placing him back in his employment from the date of dismissal is meant to ensure that he is financially in the same position he would have been had the procedures only been finalised at the stage that the arbitration or adjudication was finalised.

[57] If, therefore such an employee has prior to the finalisation of the matter secured alternative
employment or generated any income that he would not have earned had he remained in the employment of respondent from the date of dismissal to the date the arbitration or adjudication being finalised, such amount must be deducted from the total amount he would have received had he or she remained in his or her employment until the finalisation of this matter.

[58] In the circumstances subsection 194(1) seeks is to offset the consequence of a procedural unfair dismissal by reverting to

the status ante quo from the date of dismissal to the date of the finalisation of the arbitration or adjudication in so far as the monetary loss is concerned.

[59] I therefore differ with Zondo AJ, as he then was, and Maserumule AJ in that while I agree that subsection 194(1) is prescriptive it does not mean that an employee whose dismissal is found to be procedurally unfair is entitled to profit simply because of a procedural defect i.e. an employee who may have generated income which he might not have done had he remained in employment pending the compliance of procedural requirements cannot receive his full remuneration for the period from the date of his dismissal to the date of finalization of the arbitration or adjudication proceedings and thereby receive "double benefit".

[60] This interpretation, I believe is borne out by the provision of Section 194(2). There can be no dispute that the legislation intended that where an employee's dismissal is found to be substantively unfair the compensation that such employee must receive must at the very least be equal to what such employee would have received had his dismissal only have been procedurally unfair, but, by going further and limiting the total amount that may be awarded to the employee, this section by necessary implication does not foresee that an award for procedural unfairness would exceed 12 months.

[61] I say this because it cannot be conceivable that an employer who is only found to have committed a procedural irregularity can be burdened with payment of compensation in an amount greater than it would have to pay where it dismissed an employee for no justiciable reason. More importantly Section 194(2) also does not say that an employee whose dismissal is

found to be substantively unfair must be awarded compensation 'in addition to' the amount specified in Section 194(1) but rather provides that the compensation must not be less then the award specified in Section 194(1) and not more than 12 months remuneration.

[62] In the circumstances where an employee's dismissal is found to be unfair because the employer failed to prove that the reason for the dismissal was a fair reason, the question of procedural fairness does not arise and this court or the arbitrator may only grant compensation in terms of Section 194(2) of the Act. Where the employee's dismissal is found to be unfair only because the employer failed to follow a proper procedure then the court or arbitrator must grant him such amount of compensation that would place the employee in the same financial position that he would be as at the date of the finalization of the arbitration or adjudication.

If the arbitration or adjudication is only finalized after a 12 month period has expired since the dismissal the award in terms of Section 194(1) can however not exceed compensation for a period of 12 months.

[64] Applying the above reasoning to this matter, here the applicant, as agreed by the respondent earned a monthly remuneration of R26 230,00. He was dismissed on 8 September 1997 and was paid the following amount:

Salary in lieu of notice	R17 250,00
Non-reimbursive entertainment allowance	R 1 250,00
R18 500,00	

(less the normal deductions plus leave pay as also his salary for days worked in September)

[65] The amount to which he would have been entitled had he not secured other income is the following:

9 September to 30 September

R26 230 ÷ 30 x 22	R19 235,33
1 October to 31 March	
R26 230 X 6	157 380,00
1 April to 23 April	
R26 230 ÷ 30 X 23	20109.67
	R196 725.00

[66] Applicant admitted that he has been earning income since 24 November 1997 and although initially stated that medical contributions from the employer only commenced in March 1998 he conceded that it may have been paid since he commenced this employment. His monthly income therefore as and from 24 November 1997 amounted to R17 974,00.

[67] The amount which must be deducted from the amount computed in 65 above is the following:-

24 November to 30 November

R17 974 ÷ 30 X 7	R4 193,98
1 December to 31 March R17974 X 4	71 896,00
1 April to 23 April R17 974 ÷ 30 X 23	13 780,07
	R99 870,05

[68] Finally the amount of R1250.00 constituting the non-reimbursive entertainment allowance may also be deducted as this amount has been taken into account in calculating the Applicants remuneration.

[69] In the circumstances the applicant is entitled to the sum of R196 725.00 less R99 870,05 and R1250.00 amounting to R95 604.95

[70] Although the applicant did not pursue his claim for costs, I believe this is a matter, where the Applicant is entitled to costs of suit.

[71] In view of the aforegoing the following orders are made:
(a) The dismissal of the applicant by the second respondent with effect from 8 September 1997 was procedurally unfair.
(b) The second respondent is ordered to pay to the applicant the amount of R95 604.95 as compensation by no later than 30 April 1998.
(c) That second respondent pay applicant's cost of suit.

B WAGLAY A.J.