IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: C12/2003

In the matter between

PRAVIN PARBHOO Applicant

And

BYTES SOFTWARE (PTY) LIMITED Respondent

JUDGMENT

SEMENYA AJ

[1] In a letter dated 31 May 2002, the respondent advised the applicant that due to the respondent's operational restructuring requirements, the applicant's job with the respondent has become redundant and his employment was terminated. It is that decision that explains the present proceedings. The applicant challenged the dismissal for want of procedural fairness. It bears mentioning that there is no dispute that substantively the respondent had legitimate grounds to restructure and there is no contest regarding the substantive fairness of the dismissal.

[2] Mr Sid Stoffberg **("Stoffberg")** testified on behalf of the respondent. In summary he stated the following: In December 2001, the respondent became a wholly owned subsidiary of the Bytes Technology Group ("BTG") when it purchased 40% of the shares that were

held by Old Mutual. What followed was a process called Participlan that looked towards developing a long term sustainable business model. The possibility of a restructuring became apparent when the respondent realised losses approximating a million rand for each months of January, February and March 2002. The need was therefore present to bring costs in line with the realistic revenue expectations.

[3] On 29 April 2002 a letter was sent to all the employees, including the applicant. The letter advised staff that the respondent was experiencing losses and the view of management was that the losses would continue unless significant and urgent steps were taken to restructure the company. The letter announced that BTG has taken an in-principle decision to restructure the business in an endeavour to reduce costs in line with realistic revenue expectations and further that certain positions of the staff may become redundant.

[4] It was anticipated that the restructuring would improve the company's financial performance, entail cost cutting; re -allocation of responsibilities, closing of certain departments, restructuring of remaining departments as well as the development of new positions which will enhance the company's ability to offer products into the market.

[5] The letter to staff invited staff to consult with management regarding the latter's in-principle decision to reduce staff costs and to consult on alternatives to dismissals. The consultation was to canvass matters such as reduced dependency on contractors; early retirement; redeployment within the Software Division; redeployment within BTG as well as redeployment within the mother company, Alton Group.

[6] Consultation, Stoffberg testified, and is confirmed in the letter of 29 April 2002, was a process that was to commence as soon as was possible with a view to conclude by the end of May 2002. The letter promised meetings with all departments and affected employees.

[7] On 30 April 2002, Stoffberg addressed all the employees in a meeting lasting over

two hours on the issues that are covered in the general notification of 29 April 2002. Some questions were raised and answered. The selection criteria for the staff reduction was to include the following: retention of necessary skills and knowledge; performance; closing of business units and non- profitable business offerings; reorganisation of the remaining business units; transfers and relocation of skills; operational requirements; redeployment and multiskilling. Within the reorganisation process new positions would be proposed and the people would be invited to apply for those positions.

[8] Relevant to the business unit that the applicant belonged, there were five incumbents who were notified that their positions were at risk. The reorganisation was to translate in five positions that were to be collapsed into three. For that reason a letter dated 10 May 2002 was addressed to the affected employees, including the applicant. The letter invited the employees, if so inclined, to apply for any of the positions that may become available.

[9] On 13 May 2002 a further meeting was held with specific business units. Questions were asked and answered. The project managers, including the applicant, requested a separate meeting. For that reason, the organisational structure pertaining to them was held over to the postponed date. On the agreed date, 15 May 2002, the project managers wanted clarity why they needed to apply for their positions. They pointed to the fact that their jobs have not changed. The questions were answered and it was explained that the new project managers would have additional responsibilities. All the five people applied for the available positions. Applicant applied for both the positions and was unsuccessful.

[10] Evidence was tendered how the interviews were handled, who was present at the interviews, how the candidates were scored as well as how the scores of each interviewer was aggregated to come to the outcome of the successful candidates. It is to my mind unnecessary to elaborate on this process save to say that it offered a process by which the respondent sought to minimise the job losses that the restructuring would entail.

[11] Ms Schoeman also testified. She is the employee responsible for the HR functions of the respondent. She was present throughout the process of the restructuring and interviews. Her testimony is on fours with that of Stoffberg. In addition however, is her evidence that effort was made to see where in the greater scheme of the sister companies could the services of those employees at risk of losing their jobs could their services be redeployed. Nothing could be found for the applicants. She confirmed the outcome of the interviews to have been done fairly and objectively. The method, process and scoring of the interview was announced in advanced and adhered to.

[12] The engagement that she had with the applicant related to the applicant questioning why he was at risk of losing his job when a month earlier he had received a performance appraisal that was exceptionally good. She confirmed that the applicant was indeed one of the most impressive, hardworking members of the staff. She consulted with the applicant regarding the severance pay as well as shared information with him about other placement agencies that the applicant could use to find alternative employment.

[13] The final result of the restructuring was that the contractors were substantively reduced; relating to the unit which the applicant belonged, early retirement was not an option because the employees were below the early retirement age of 55 years; redeployment on the family of the Alton Group was explored with no answer for the applicant. Ultimately 20 employees lost their jobs.

[14] The applicant testified. He did not contest in substance the factual evidence tendered by the two witnesses called by the respondent. He maintained that the dismissal was unfair on the procedural grounds. It is useful to point to the aspects of the dismissal process that the applicant contended was unfair. In the first place, the applicant did not concern himself much with the invitation to consult following the letter of 29 April 2002. He was of the view that he could not be one of those exposed to a possible retrenchment. He considered himself an excellent employee no less because of outstanding performance appraisal that he had

received a month before.

[15] Further, the applicant questioned the selection criteria adopted and testified that it was unfair because LIFO was not implemented. He had been with the company for 17 years at that stage. It was his view that his long record with the company would save him the retrenchment. It was further his evidence that he did not think that the job demands of the new project manager had substantively altered. Further, he questioned why the company did not adopt a similar approach when it offered one employee a position without re -advertising.

[16] His evidence was further that he indicated that he was prepared to take a reduction in salary. Following the invitation to apply for the vacant positions, he did. He was interviewed for the two positions and was advised on 30 May 2002 that he was unsuccessful for the two positions. He had received the letter dated 31 May 2002 advising him that no alternatives to retrenchment could be found and his services were terminated. He later learned that one of the successful candidates tendered a resignation and was told that the company did not intend to fill the post. The post remains vacant at the date of this trail.

Section 189 of the Labour Relations Act 66 of 1995, (**"the Act")** impels that dismissals that are based on the operational requirements of the employer must meet procedural and substantive fairness. As earlier stated, the applicant conceded, quite correctly, that no debate arises as to the substantive fairness of the dismissal. The question for the Court is whether the dismissal was procedurally fair or not. The respondent bears the onus in this regard.

[17] Law Reports are replete with the Court's pronouncements of what would be the approach of the Court in determining what is fair and what is not. Each case invariably depends on its own facts and circumstances. In **Johnson & Johnson (Pty) Ltd v CWIU (1999) 20 ILJ 89, FRONEMAN DJP,** in the often cited passage pointed out that the mechanical **"checklist"** kind of approach to determine whether section 189 has been

complied with or not is inappropriate. As stated in at 97 B-E of that judgment "**mention has already been made in section 189 is inextricably linked to the issue whether the dismissal based on operational requirements is fair or not. In testing compliance with its provision by determining whether the purpose of the occurrence of the joint consensus- seeking process has been achieved or frustrated, a finding of non-compliance by the employer will almost invariably result also in the dismissal being unfair for the failure to follow a proper procedure. It is difficult to envisage a situation where the result could be different"**

[18] The applicant contends that there was no consultation as required by law. The contention stands at odds with the objective evidence. The letter of 29 April 2002 to all employees expressly calls for consultation on all the issues identified therein; meeting with the staff was held the following day; the meeting lasted over two hours, there was a further meeting on the 13th and 15th of that month. The applicant had the opportunity to raise matters that he would have thought relevant. He did not do that. He cannot put the blame elsewhere- see **Van coille v Sanlam Life Insurance Ltd (2003) 24 ILJ 1518 LAC at 1526 [24].**

[19] The law demands the employer to consult with the affected employees. The letter of 10 May 2002 identifies the applicant as well as others that they are at risk regarding the restructuring. Not only was the applicant in the meeting of the 13th but he is part of those who called for a further meeting of the 15th. A contention therefore that he was not consulted is without merit. It has been authoritatively spelled out in **SACWU & OTHERS V AFROX LTD (1998) 19 ILJ 62 (LC); UPUSA & OTHERS V GRINAKER DURACET (1998) 19 ILJ 107 (LC), FAWU AND OTHERS V IRVIN & JOHNSON& JOHNSON LTD [1999] BLLR (LC)** that consultation is a benefit that the beneficiary can forgo if it chooses and will forfeit unless it actively responds by engaging in the process. The applicant was aware of the process of the restructuring. He elected to think he would not be

the victim to the process. The notification of 10 May 2002 to him identifies him specifically as the one at risk in the process. He is part of the meeting of the 30th of April, 13th of May as well as the 15th of May. Under these circumstances he cannot complain of want of consultation when he did not engage in the process actively.

[20] It bears mentioning that the pleadings of the applicant point to something more sinister regarding his dismissal The allegations assert a concerted design by the employer to exclude him specifically. His evidence did not even come close to that conclusion save to express dismay that he would suffer the adverse consequences of the restructuring despite his excellent work record. It is regrettable that this is the outcome. The dismissals are by definition '**no fault'** dismissals. In the process 20 people ultimately lost their jobs. The applicant cannot claim to have been discriminated as an individual.

[21] Regarding the selection criteria, it was suggested to the applicant in cross-examination that even if LIFO was agreed upon, he would still have not survived that criteria. The applicant did not counter that proposition at all. In any event what the law requires is criteria that is objective and fair. There is no basis, certainly no evidence, to suggest that the criteria in the present case was anything but objective and fair.

[22] Initially Mr Du Plessis, appearing for and on behalf of the applicant submitted that the dismissal was procedurally unfair because there was no consultation. He contended that since the meetings were not minuted, there could not therefore have been compliance with the requirements of section 189. Nothing could be said for that contention. There is hardly any dispute regarding the content of the meeting called specifically for the purposes of the consultation. The subject- matter of those meetings was clear to all present. A minute of those meetings would bring no point home that the evidence was unable to establish.

[23] In the circumstance, I am satisfied that the evidence demonstrates, at the required level of proof, that the dismissal was procedurally fair. There being no issue regarding the

rational for the restructuring and the admitted substantive fairness of the dismissal, the applicant's case stands to fail. The applicant's case is therefore dismissed with costs.

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Semenya AJ

Appearance:

For the Applicant	:	Mr D Du Plessis
Instructed by	:	Bagraims Attorneys
For the Respondent	:	Mr D Nel
Instructed by	:	Webber Wentzel Bowens
Date of hearing	:	4-6 February 2004
Date of judgement	:	27 February 2004