IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

Case No: JS 436/06

REPORTABLE

In the matter between:

CHRISTOPHER BROWN Applicant

and

AFGRI PRODUCER SERVICES (DIVISION OF AFGRI OPERATIONS LIMITED) Respondent

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JUDGMENT

MOSHOANA, AJ

INTRODUCTION

[1] This is a referral brought in terms of Section 191 of the Labour Relations Act. The Applicant, Christopher Brown alleges that he was unfairly dismissed on 31 January 2006. After conciliation having failed to resolve the dispute, the Applicant referred the matter to this Court for adjudication. In essence the Applicant alleges that his dismissal

for operational requirements is unfair and he seeks compensation in terms of Section 194 of the Act.

PRELIMINARY ISSUES

[2] Before I deal with the merits of the matter I find it appropriate at this stage to deal firstly with the question whether the Applicant agreed to his retrenchment. At the commencement of the trial, Advocate Cook appearing for the Respondent pointed out to the court that the real issue in dispute is as set out in **paragraph 6.1.4** of the Pre-Trial Minutes. That paragraph reads as follows:-

"If it is found that the Applicant had agreed to the termination whether he had done so on grounds of misrepresentation of information by the Respondent."

[3] It is apparent that the Respondent holds a view that because the Applicant had agreed to a retrenchment, the Applicant is not entitled to challenge the fairness of the dismissal. Advocate Cook went to the extent of submitting that the Applicant did not lead evidence of him being coerced into entering into an agreement to have him dismissed.

[4] Having said that, it is my view that this is not a matter where it could be said that there was a mutual termination of employment. In court Mr Nielsen, the Respondent's witness testified that in fact the Applicant opted for voluntary retrenchment. Mr Manyama also for the Respondent struggled to distinguish between a voluntary retrenchment and a forced retrenchment. However he testified that had the Applicant not agreed to his retrenchment there would have been a further consultation, which would have culminated in the Applicant being dismissed for operational requirements. This was also the submission by Advocate Cook at the conclusion of the evidence stage. If the court were to adopt a simplistic approach, therefore the Applicant is bound to fail in his quest for unfair dismissal claim in that he had "agreed to a retrenchment".

[5] I have serious misgivings about the allegation that the Applicant agreed to a retrenchment. In the first instance, the Applicant was "out of the blue" served with a letter which shall be referred, to in details, later in this judgement. On the Monday, after receiving the letter, he was called into a one-on-one meeting wherein he was told by Mr Manyama that in terms of LIFO he had to go. The Applicant in court testified that being faced with that statement, I had no option but to agree that I would be retrenched. In the Court's view that does not

necessarily take away the right of the Applicant to later challenge the fairness of the dismissal. As I have pointed out earlier, if the Court were to take that simplistic approach, then the Court would be failing in its duties to ensure that the right to fair labour practice as enshrined in the Constitution for the workers of this country is protected. It ought to be borne in mind that the Respondent bears an onus, in terms of Section 192 of the Labour Relations Act, to justify the dismissal.

[6] The Applicant, on 31 January 2006 received a letter, which letter was captioned *"Termination of Employment"* and that letter was drawn up by Mr Manyama. If indeed the Applicant had agreed to being retrenched, I would have expected the Applicant to write a letter indicating that I agree to be retrenched. As pointed out by Applicant's legal representative, in matters of that nature there would probably be a settlement agreement setting out the fact that the parties have come to an agreement of mutual termination of employment. In such instances, the court would lack jurisdiction to entertain any aspects of unfairness of the dismissal because there would not have been a dismissal as defined in Section 186, but there would have been a mutual termination of employment.

[7] In its papers, the Respondent did not raise a point that the court lacks jurisdiction to entertain the dispute. Moreso, the Respondent admitted **paragraph 4** of the Applicant's Statement of Case which sets out that there was a dismissal on 31 January 2006. Further the Respondent contends in its Statement of Response that the Applicant agreed to termination of services based on the Respondent's operational requirements. During argument, I invited Advocate Cook to address me on how can an employee agree to a dismissal based on the employer's operational requirements, when an employee under those circumstances would not even know what those operational requirements are. However, nothing much turns on that issue. In order to determine this disputed fact, I have to consider the evidence of Mr Manyama and that of the Applicant. Mr Manyama testified that after presenting the letter of 27 January 2006 he had two meetings wherein the Applicant was involved, that was on 30 January 2006. In his evidence, which the Court rejects, there was a general meeting and subsequently a one-on-one meeting.

[8] I am not satisfied that indeed there was such a general meeting. The evidence of the Applicant was that there was only one-on-one meetings and that evidence was corroborated by Rian Van Der Merwe, one of the dismissed employees. What makes the evidence

of Mr Manyama so perplexing and unreliable is that during cross examination he attempted to dissect the “minutes of the consultation meeting” into two portions. He testified that the first paragraph of the minutes relates to the general part of the meeting and the other portions relates to the individual parts of the meetings. Surely Mr Manyama as an experienced HR Manager should have known that proper minutes should be kept for the Court to be able to understand and possibly accept his contention that there were two meetings. However, later in cross examination, he testified that in fact the first paragraph of the minutes is also part of the meeting with individuals and the general meeting. This I find unconvincing and actually poor testimony. If indeed there was a general meeting as testified, then it makes no sense why in that general meeting Corrie Van Zyl was not present nor was put on a telephone conferencing. It is undisputed that the letter of intention to restructure in respect of Corrie Van Zyl was only presented to him on 30 January 2006 at 14H40. Surely if there was this general meeting, it would not have made sense not to include Corrie Van Zyl as an affected person. Further, there is no evidence presented that Mr Nielsen, the affected employee, was in any of these meetings, be it the general meeting or the individual meetings.

[9] I therefore conclude that there was no general meeting. There were only individual meetings. As it is borne out by the attendance list appearing in the Bundle, the Applicant was the last person to be called into that meeting. This was not disputed by Mr Manyama. Therefore, the Court accepts that the Applicant was the last person to be called into the meeting. The effect of that testimony is that as at the time when the Applicant was called in, Mr Nantis Du Toit was already offered the position based on a criterion of last in first out. I shall return to this aspect when I deal with the selection criteria, whether it was agreed or not? Effectively it is possible as the Applicant has testified that when he got into the meeting he found a situation where other employees had already been told to leave on the basis of LIFO, such as Rian Van Der Merwe. Therefore the question is what option did the Applicant have other than to accept the situation as it was presented to him at the time? That in the Court's view does not amount to an agreement, because the Applicant was faced with a *fait accompli*, which point, I will return to when I deal with procedural fairness.

[10] Even if I were to accept, which I do not, that there was an agreement to retrenchment and the Applicant had received the monies as set out in the letter of termination, that does not prevent the Applicant to later

challenge the fairness of such a dismissal. Of course such a situation would depend on the facts of each case, if proper agreement exist, the Court's jurisdiction is ousted (*supra*).

[11] In **Roberts and Others v WC Water Comfort (Pty) Ltd (1999) 1BLLR 33(LC),** Revelas J had the following to say:-

"Section 189 of the Act has set out extremely far reaching obligations for the employer to fulfil when the employer contemplates to dismiss one or more of its employees for operational requirements. In this section of the Act, quite plainly reflects that a proper procedure must be followed when employees are to be retrenched. The Constitution, particularly Section 24 thereof guarantees fair labour practices. Therefore, this court must be very cautious before it makes orders in terms of which employees' claims could be dismissed without hearing oral evidence when they dispute the fairness of their dismissal, even though they have signed documents to the effect that they accept their severance packages in full and final settlement of all claims arising out of the dispute".

[12] Revelas J went further to say:-

"In effect, what is argued by the Respondent is that by accepting the monies, the Applicants have waived their right to challenge the

fairness of their dismissal. For the reasons set out herein before I do not believe that the court could come to a finding nor the Applicants have waived such a right on the papers before it. Each case would have to depend on its own facts but on the evidence and in the circumstances now before me I decline to make such an order".

[13] I am in full agreement with the sentiments expressed in that judgment. I may add that the court is supposed to play a vigilant role, particularly in no-fault dismissals. In the matter before me, it is very clear that the Applicant, a layperson, was without any representative at the time of the one-on-one meeting. It is apparent to the court that Mr Manyama took advantage of the fact that the Applicant is a layperson and somewhat painted a picture that using LIFO, being one of the fair selection criteria, the Applicant has no option but to accept the retrenchment.

[14] In **Bekker v Nationwide Airlines (Pty) Ltd (1998) 2BLLR 139 (LC)**, this Court also refused to accept that an Applicant there did not have a right to challenge the fairness of his dismissal, simply because he had entered into an agreement that he will resign due to operational reasons. The court made it clear that even under such circumstances there is still a duty on the employer to still consult properly in terms of

the Act. According to Mr Manyama, had the Applicant refused to agree to be retrenched, he would still have been consulted further and explore alternatives. This, in the Court's view, can only amount to a concession that there was never a proper consultation as contemplated in the Act. I however, shall return to this point when I deal with procedural fairness.

[15] The other aspect which is related to this issue, is whether the Applicant was misled into entering into an agreement that he would be retrenched? Nothing much turns on this point given the view I had taken above. Even if there was an agreement that does not prevent the Court in this matter to probe into the fairness of the dismissal. However for the sake of completeness, I must state that it is indeed so that Mr Manyama misled the Applicant. On 30 January 2006, Mr Manyama and the Applicant left the so-called "conditional agreement" open in order for Mr Manyama to enquire whether Corrie Van Zyl would be interested to come to Pretoria, and if not interested, then the Applicant would be retained on the basis of the LIFO criteria. His evidence was that the following day, after having contacted Mr Corrie Van Zyl, he related to the Applicant that Corrie Van Zyl has agreed to come to Pretoria, therefore that is the end of the relationship between the Applicant and the Respondent.

[16] Surprisingly, Corrie Van Zyl testified in court that the only telephonic discussion he had with Mr Manyama was when he told him about the offer to be made for him to come to Pretoria. In his evidence, he indicated to Mr Manyama that he can only consider that offer if same is reduced to writing, which was indeed reduced to writing and presented to Corrie Van Zyl on 02 February 2006 at 15H01. Despite attempts by Advocate Cook to extract a concession that he, Corrie Van Zyl, left Mr Manyama with an impression that he is coming to Pretoria, he was adamant that he never undertook to come to Pretoria. On the other hand Mr Manyama testified that Corrie Van Zyl had accepted hence he conveyed the information to the Applicant on 31 January 2006. The testimony of Mr Manyama had nothing to do with some form of an impression been left.

[17] He was categorical in his testimony that Corrie Van Zyl told him that he had accepted the offer and he would be coming to Pretoria, therefore the Applicant would be dismissed, due to operational requirements. His evidence on that score is consistent with what has been pleaded by the Respondent in **paragraph 3.10**, wherein the Respondent submitted that Corrie Van Zyl has accepted the position in Pretoria but has not as yet relocated there physically. If one

considers the evidence of Mr Van Zyl in its totality, he had never accepted a position in Pretoria. On 10 February 2006, after repeated offers persuading him to come to Pretoria, threatening him with a dismissal if he does not come to Pretoria, he had the following to say:-

"I can assure you that it was not easy to say no to the offer and if I had time on my side I definitely would have accepted the offer. I would like to take this opportunity to thank my employers for eighteen (18) wonderful, fulfilling and productive years in which they allowed me to develop and grow in my personal and professional capacity. May I wish you all of the best for the future and I am awaiting your final decision."

[18] The contents of the letter by Mr Van Zyl was clearly pointing to the fact that he was prepared to be dismissed as he was told in the letter of 08 February 2006, the last paragraph thereof read as follows:-

"You are, therefore, requested to reconsider our offer as the company may be left with no alternative but to terminate your employment".

[19] For some unknown reasons the Respondent on 30 June 2006 decided to suspend the transfer to Centurion until further notice and

advised Mr Van Zyl that his responsibility and station will remain the same until further notice. This issue may become relevant later when I deal with the rationale for the dismissal of the Applicant.

[20] On the evidence before me, I conclude that indeed Mr Manyama misled the Applicant insofar as stating that Mr Van Zyl would be coming to Pretoria. As I have pointed out nothing much turns on this finding.

BACKGROUND FACTS AND EVIDENCE

[21] The Applicant commenced employment with the Respondent on or about 01 March 2003 as a Product Manager. The Applicant's duties amongst others were to deal with suppliers, negotiate prices with those suppliers and acquire such suppliers for the company. The Applicant was dealing with about eighty (80) stores. There were four (4) Product Managers, Applicant included. There were two Assistant Product Managers who were mainly employed to do administration work and were not involved in the negotiations with the suppliers. The said Assistant Product Managers were employed long after the employment of the Applicant. The retail side of things was performing poorly hence the Applicant and his colleagues were employed to

ensure that the retail performs better. In fact Rian Van Der Merwe, one of the Product Managers, who also was dismissed, was head hunted in order to assist in retail as the people who were employed at the time did not have sufficient knowledge and capacity. This evidence was not challenged.

[22] Around November 2005, two hundred and eight nine (289) employees were retrenched by the Respondent as a result of closure of the retail stores in Jetpark and Brooklyn. That then left the Respondent with one thousand seven hundred and forty four (1 744) employees. The evidence of Nielsen was that there were forty-six (46) employees in the unit which he was heading and the Applicant was employed there.

[23] During December 2005, there was social function, wherein the Applicant and his colleagues were in attendance. In that function, the Applicant testified that Louis Smit, the CEO of the Respondent, gave them an undertaking that the spate of retrenchments is over and the company will be able to move forward with the team that included the Applicant and Rian Van Der Merwe. This aspect was disputed by Mr Manyama. However Mr Manyama was not very direct in terms of his dispute. In his evidence he was referred to paragraph 16.2 of the

questions posed by the Applicant and a question was couched in the following manner:-

"*Does the Respondent dispute that Mr Louis Smit of the Respondent informed the Applicant together with certain other employees at a function in December 2005 that the recent spate of retrenchment had come to an end?"*

"Respondent: Louis Smit of the Respondent was referring to the restructuring process that was being undertaken and which had been ongoing for some time. It was never stated that the restructuring had come to an end in fact the Respondent is currently undertaking a restructuring process that may affect many branches country wide."

[24] He further testified that when he looks at the statement quoted above there is a clear contradiction and he relegated that to being a mistake.

[25] In the circumstances, I must accept the testimony of the Applicant, corroborated by Mr Van Der Merwe, that indeed they were told that recent spate of retrenchment had come to an end. That being the case, out of the blue, it being common cause, the Applicant was

served with a letter that appears on **page 1 of Bundle A.** It is uncontested evidence that such a letter was served onto the Applicant and others late in the afternoon on Friday. I shall deal with this letter later when I deal with procedural fairness. Suffice to mention at this point that no proposal was contained in the letter, setting out the selection criteria.

[26] The said letter is headed "**Intention to restructure**" and as reasons for such an intention to restructure, the following is stated:-

"An important obligation of the management towards its shareholders is to optimise the return on investment. Consequently management is continually looking for ways to be more efficient and effective to boost the overall performance. The division is not profitable and is operating at a loss due to turnovers that are at the level which is not acceptable, or alternatively operating on a level which is not feasible to continue with. It therefore appears that for strategic, economic and efficiency related reasons the staff compliment, work methods and core-structures of this division will be adjusted to a level that proportionate to the current and future levels of business activities.

[27] As at the time when the Applicant joined the Respondent, the Respondent was operating at a loss. The year before the dismissal of

the Applicant, the loss was at One Hundred and Fifty Million (R150 000 000.00). As confirmed by an extract from the annual report the loss for 2006 – 2007 financial year had come down to around Eighty Million Rand(R80 000 000.00).

[28] On 30 January 2006, according to Mr Manyama, he called a general meeting wherein everybody else who is said to be affected was present except Corrie Van Zyl who was still on his way. In that meeting Mr Manyama explained the contents of the letter. As pointed out earlier in this judgment, this general meeting was disputed by the Applicant and Rian Van Der Merwe. I have already made a finding that there was no such a general meeting.

[29] The Applicant and his colleagues were called one by one into a meeting with Mr Manyama. As conceded by Mr Manyama, the first to be called was W P Visser followed by S Du Preez, F L J Du Toit, P R Van Merwe and lastly the Applicant. The Applicant recalls that he observed employees going in and out of the meeting, others waving goodbye after the said meeting, others visibly elated whilst others were shedding tears. This was not disputed and was corroborated by Riaan Van Der Merwe. At that point in time, the Applicant was very much concerned as to what is going to happen to him. His turn came

and he was told that LIFO was to apply as a result of which Nantis Du Toit had already been retained. The Applicant then enquired about the position of Corrie Van Zyl, wherein Mr Manyama indicated to him that he would establish whether he is coming to Pretoria, if he does not, then the Applicant would be considered. The evidence of Mr Manyama was very confusing on this aspect as to whether the Applicant would be considered in a sense of being retained using the LIFO system or considered in the sense of either being accepted to stay or still rejected, even when Van Zyl is not coming. The Applicant on the other hand testified that using LIFO, he would have been the next to be retained as he was the longest serving if Corrie Van Zyl is left out of the equation. Earlier in this judgment I have dealt with the issue of whether there was an agreement that the applicant would be retrenched or not. On 31 January 2006, Mr Manyama reverted to the Applicant and told him that Mr Van Zyl is coming to Pretoria and he then issued him with a termination letter, which contains certain amounts payable to the Applicant. As a result of the discussion over the termination an amount of R100.00 for a chair he purchased from the company was then written off. The Applicant signed that letter and wrote therein the following:-

"Signed as a received document only as at 01st February 2006."

[30] Although the letter is dated 31 January 2006, it does not seem to be disputed that it was only handed to the Applicant on the 01 February 2006. The applicant states that the purpose of that inscription was to indicate that he does not agree with the contents but just accepts receipt of the letter. On the other hand Mr Manyama's testimony was that, that was confirmation that the Applicant had agreed to the retrenchment. I have already dealt with this issue earlier.

[31] Mr Manyama was questioned during cross examination as to when was the decision to restructure taken. He testified that such a decision was taken about two (2) weeks before letters were issued. On the other hand, Mr Nielsen testified that at the beginning of the year, in January 2006, he had prepared a budget, which budget the court did not have sight of and such a budget was then presented to the Board by Louis Smit (whom the court did not hear his evidence). The first budget was then rejected by the Board. He then prepared another budget, which budget was apparently accepted by the Board. After the acceptance of the budget by Board, on 13 January 2006, he was instructed by Louis Smit to go and prepare a structure that would accommodate the budget. He then on his own went to prepare the structure, which structure reduced the number of Product Managers from four (4) to two (2). He then presented the structure to the

Management Committee on 23 January 2006 which approved it to be implemented. He then gave the structure to Mr Manyama to start the process.

[32] Meanwhile, the Respondent did everything in its powers to persuade Corrie Van Zyl to stay as a Product Manager. The Respondent went to the extent of proposing to increase the salary of Mr Van Zyl from R400 000.00 (Four Hundred Thousand Rand) to R600 000.00 (Six Hundred Thousand Rand), to incur the relocation costs and to give him an allowance of one month salary. The office of Nelspruit had three (3) employees, being Mr Van Zyl and two assistants. The running costs for the said office per year amounted to R1 000 000.00 (One Million Rand). This evidence was unchallenged.

[33] The Applicant was aggrieved by his dismissal and referred the dispute to the CCMA for conciliation which could not resolve the dispute. The matter was then referred to this Court for adjudication.

ISSUES TO BE DECIDED BY THE COURT

[34] In the Pre-Trial Minutes concluded by the parties, the following were set out as issues in dispute and to be decided by the court:-

1. Whether the nature and contents of the consultations with the Applicant complied with all the requirements of the Labour Relations Act?
2. Whether or not the Applicant had agreed to the termination of his services?
3. Whether or not the Respondent has misled/attempted to mislead the Applicant in the process?
4. If it is found that the Applicant had agreed to the termination, whether he had done so on grounds of misrepresentation of information?
5. Whether or not dismissal was for a fair reason?
6. Whether any compensation should be granted to the Applicant and if so how much?

[35] Suffice to mention at this juncture that some of the issues have already been decided earlier in this judgment. When I analyse the evidence, I would at the same time decide other issues that I have not yet decided.

ANALYSIS

[36] The Court was far from being impressed by the testimony of Mr Manyama. He contradicted himself on material issues. For instance he contradicted a clear and lucid evidence of Corrie Van Zyl that he did not agree to come to Pretoria and that he was not in a one-on-one meeting in Pretoria. On the other hand the Court was impressed with the evidence of Mr Van Zyl, his evidence was lucid and clear and the Court does not hesitate to accept it. Again Mr Manyama when pointed to certain aspects that appears in the Pre-Trial Minutes, he sought to relegate them to being mistakes when they are clearly against his own evidence that he presented before me. By and large his evidence was very much unreliable.

[37] On the other hand, the Court accepts the evidence of Rian Van Der Merwe without any hesitation. Most importantly, Mr Van Der Merwe was not challenged in his evidence that he was head hunted and purely for the purposes of turning around the losses that the Respondent was facing.

[38] The Court has found the evidence of Mr Nielsen to be honest. Although he attempted to defend the decision taken by the Respondent in this regard, he honestly testified that the losses in the company has been there since 2003, notably long before the

Applicant and Mr Van Der Merwe were employed. He also confirmed that the Applicant was doing a good job and in the unit he was heading, things were in order. He only referred to the extract from the annual report that reflect the R80 000 000.00 (Eighty Million Rand) loss for 2006 – 2007. He honestly conceded that the loss of R150 000 000.00 was reduced substantially to R90 000 000.00. He honestly testified that what prompted him to do the structure was the rejection of the budget and the instructions from Louis Smit.

[39] He further honestly testified that he sought no input from the Applicant and his colleagues when he worked on the structure and the costing. Further he testified that the structure was then approved by the management committee whereafter he instructed Mr Manyama to start the process. Although he was not clear what he meant by "starting the process", but it follows that Manyama started the process of consultation in implementing the structure that he singlehandedly had put in place. He testified that although he was an affected party in that unit his position was retained in the structure. He was never part of the general consultation as testified by Mr Manyama or the individual consultations. His evidence also brought to light the fact that certain employees were left unaffected in particular those who deal with creditors and the Assistant Product Managers. His evidence

also revealed that at least in his unit there were about forty six (46) employees but only six (6) were affected. Ironically out of the six, two were retained because of the functions that they perform, which were critical, in this regard the Assistant Product Managers. Contrary to his evidence, the letter by Mr Manyama refers to only six people that are likely to be affected. From the evidence, it is clear that the six would have been the Product Managers and the Assistant Product Managers to his (Nielsen) exclusion.

[40] On the other hand, the Applicant was not a good witness, in the sense that he made certain concessions which if looked at superficially are destructive to his case. Such concessions being, that he agreed to the retrenchment and that LIFO was agreed as a selection criteria. I however consider those concessions in the light of the evidence as a whole. I therefore do not find that the concessions he made are destructive to his case. All the Applicant had to prove was that he was dismissed. As I have pointed out, from the papers it is very clear that there was a dismissal, hence the Respondent accepted the onus to justify the dismissal and also led evidence in an attempt to justify why the Applicant ought to have been dismissed, this is despite its stance that the Applicant agreed to a retrenchment.

SUBSTANTIVE FAIRNESS

[41] As I have already found, even in instances where the Applicant could have agreed to the retrenchment, there was still an obligation on the part of the Respondent to prove the fairness of his dismissal and to provide the fair reason for it. At the commencement of the proceedings, it was placed on record that the Applicant contests the economic rationale for his dismissal. Advocate Cook noted that point and made no submission that the Applicant is not entitled to challenge it because he had agreed to the retrenchment. Nonetheless even if he could have attempted to do so, in my judgment such a submission would have been misplaced.

[42] Dismissal based on operational requirements is a no-fault dismissal. Accordingly it is incumbent on the Respondent to present evidence in court to justify the decision to dismiss. At the end of the matter, after hearing all the evidence, the Court was still not certain as to what the reason for the dismissal of the Applicant in particular was. It is common cause that during the financial year 2006 – 2007, the Respondent showed a loss of about R80 000 000.00 (Eighty Million Rand). However the question becomes how does the dismissal of the Applicant save the Respondent from such losses? This is critical

when one considers the fact that the losses were there even at the time the Applicant and Rian Van Der Merwe were employed. There is undeniable evidence that there was an improvement in terms of profitability, to which in the Court's view, the Applicant contributed. In my view it makes no sense for an employer to take into employment an employee in instances where it is running at a loss and then later, three years down the line decide to terminate because of the losses. That does not make sense, particularly where the losses were substantially reduced. What is then sensible would be for an employer not to even employ somebody when it is faced with such circumstances. The position could be compared with the one where an employer enters into a fixed term contract and before the end of the fixed term it seeks to terminate the employment because of operational requirements. The Labour Appeal Court in the matter of **Buthelezi v Municipal Demarcation Board (2005) 2 BLLR 115 (LAC)** at 118 para 9B and 120 para 11 A-B had commented that in such instances it can only point to poor planning when an employer employs an employee for a fixed term whilst it has not considered what its future could be. I say no more in this case.

[43] Nonetheless, I am not convinced that the Respondent's reason for termination is because of the loss. This is fortified by the evidence of

Mr Nielsen, wherein he stated that he decided to declare two positions redundant in order to accommodate the budget. As pointed out earlier in this judgment, the Court has not seen any of the budgets. The Court has not been told what were the considerations for rejecting the budget that led to the restructuring. Mr Nielsen conceded that when he restructured he sought no opinion or no view from the Applicant and his colleagues. (See **Steyn and Others v Driefontein Consolidated Ltd (2001) 22 ILJ 231** and **Mokhoba v JFPM Ltd** yet unreported **JS 723/2007**).

[44] In determining the fairness of the dismissal, this Court will not and must not defer to the employer when it has to answer the question whether the dismissal is fair or unfair **(See CWIU and Others v Algorex (Pty) Ltd 2003 24 ILJ 1917(LAC).** The Court would not rely on the say so of the employer, that it has a rationale for dismissal and not probe whether indeed that **r**ationale is justifiable. It ought to be borne in mind that dismissal should be the only available option for it to be justified.

(**See Oosthuizen v Telkom SA Ltd (2007) 11 BLLR 1013 (LAC)** and **SAA v Bogopa & Others (2007) 11 BLLR 1065 (LAC)**).

[45] As pointed out, the Court should be presented with evidence that would lead it to the conclusion that there was indeed a commercial rationale to dismiss for operation requirements. The Respondent has not furnished the Court with the budget that was rejected, the budget that was accepted and also the structure that was approved, as testified by Nielsen, by the Management Committee. As if that is not enough, the Respondent failed to tender the evidence of Mr Louis Smith, who according to the evidence of Nielsen is the one who had instructed him to restructure. He is the one who advised that the Board had rejected the budget, which the Court is not sure whether it was to accommodated the Applicant. No evidence was led as to what considerations did the Board take in order to decide that the budget is not good enough, which led to the Applicant being dismissed. The Court considers that against the background that Louis Smit had given an assurance to the Applicant and his colleagues that there will be no further retrenchments.

[46] Obviously that evidence remains unchallenged and the only person who could have challenged that is Mr Louis Smit, whom despite the Court's enquiry whether he would be called, was not called. According to Advocate Cook he was not called because he is not part of their case and he would not have advanced their case. In my view

Louis Smit was critical in that he would have assisted the court in understanding the reasoning behind acceptance and rejection of budgets, which led to the restructuring of the department, that led to the dismissal of the Applicant. This is against the background that losses were there and were reduced substantially. (See **Tshishonga v Minister of Justice and Constitutional Development and Another (2007) 28 ILJ 195 (LC)** at 217 para111).

[47] Failure to produce a witness who is available and who is clearly able to give relevant evidence leads to an adverse inference being drawn by the court. In **Elgin Fireclays Ltd v Webb 1947 4 SA 744 (A)** at 749 to 750 the court said the following:-

"It is true that if a party fails to place the evidence of a witness who is available and able to elucidate the facts before the trial, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. But the inference is only proper one if the evidence is available and will elucidate facts."

[48] In this matter, it is uncontested that Mr Smit is still the CEO of the Respondent and he is available. However, in the Respondent's wisdom, he does not advance their case. Unfortunately the court being the one to decide the fairness of the dismissal finds that his

evidence was critical, more so that an allegation has been made that he made, certain undertakings at the social function.

(See Simelane & Others v Letamo Estates 2007 28 ILJ 2053 (LC)).

[49] It is correct, as contended by the Applicant's representative, that the Respondent is not only obliged to show the general need to retrench but must also show the need to retrench the Applicant in particular. During submissions, I enquired from Advocate Cook as to how does the dismissal of the Applicant and his colleague lead to the saving of costs being the primary reason for their termination. No clear answer was given, except to emphasize that the company was running at a loss of R90 000 000.00. I fail to understand why a dismissal of only two (2), out of forty six (46) employees would lead to cost-saving. In the whole division there were almost one thousand seven hundred and forty-four (1 744) employees. How then does a dismissal of two employees lead to a cost-saving? It therefore follows that the idea of using the losses as depicted in the annual report was truly an after thought as submitted by the Applicant's representative.

[50] Advocate Cook conceded, rightly so, that the fact that a company is running at a loss alone does not justify or lead to an automatic

retrenchment. So in my view the Respondent has failed to discharge the onus to prove the fair reason for the dismissal of the Applicant. In the letter that was addressed to the Applicant, the reasons were different from the reasons that led Mr Nielson to restructure. I enquired from Advocate Cook as to what the turnovers were which were acceptable or feasible as it is contained in the letter? At best, he submitted that the company needed to be at a point of being profitable and not have losses. If truly that was the position why did the Respondent not dismiss the Applicant when it had a loss of R150 000 000.00?

[51] The fact that the Respondent did not do so can only point to the fact that losses as depicted in the financials are not truly the reason for the dismissal of the Applicant. If one looks at the allegation that the division is not profitable and that it need to be at acceptable levels, it does appear that there are issues of performance such that the Applicant somewhat was not performing to contribute or assist in reducing the losses. Clearly that is defeated by the Respondent's own evidence that the loss of R150 000 000.00 had reduced during the time when the Applicant was still in its employ.

[52] Ironically the same Respondent who is cutting costs persuaded Mr Corrie Van Zyl to stay on and retain an expense of about a R1 000 000.00 for some time. This is clearly perplexing and can only point that the cost-cutting exercise is not the true reason for the dismissal of the Applicant. It is not clear why the Respondent who wished to centralise operations ended up with a situation where Corrie Van Zyl was left to run with the Nelspruit office. Without proper explanation, the Respondent suspended the centralisation which was one of the main objectives for the restructuring. The Applicant who was in Pretoria and willing to perform the functions was dismissed whilst Corrie Van Zyl who was willing to terminate his services was persuaded to stay at a cost with a possible increase in salary. This in the Court's view does not add up.

[53] Accordingly I find that the dismissal of the Applicant was substantively unfair.

PROCEDURE

[54] The Applicant complained that he was presented with a *fait acompli.* The Respondent disputes this and suggests that it had not taken a decision at the time when it sought to consult with the Applicant. I am

of the view that indeed the Applicant was faced with a *fait acompli.* From the evidence, it is clear that when the budgets were presented to the Board, rejected by the Board and subsequently approved by the Board, the Applicant was kept in the dark. Further it is clear that when a new structure was drawn up by Mr Nielsen and reserved his own position, the Applicant was still kept in the dark. As it is common cause, it was out of the blue, when the Applicant received the letter of 27 January 2006. The expression "out of the blue" simply suggests that the Applicant was taken by surprise. In my view not only because of the fact that Mr Louis Smit made certain undertakings but also because he was kept in the dark.

[55] The letter sent to the Applicant and other Product Managers including the Assistant Product Managers have the following caption:-

*"**RE: INTENTION TO RESTRUCTURE**. The company hereby gives notice of its intention to restructure Procurement and Finance Units, which in turn could lead to possible redundancies and retrenchment. The company thus intends to embark on a process of consultation with you about the matter, and the consultation will take place on Monday, 30th January 2006 at 07H30 at Centurion".*

[56] Clearly this statement is incorrect, in that when Mr Manyama wrote this letter he was already presented with a structure that was already adopted by the Management Committee. It does not avail to the Respondent to say that if the structure was not acceptable we could have gone back and changed it. That statement is truly opportunistic, in that Nielsen was operating under strict instructions as it were from Louis Smit, because the Board had issues with the budget. Having not heard the reasons why the budget was rejected, the Court is entitled to assume that the rejection was fixed. Accordingly it is clear that the Applicant was faced with a decision that already made his position redundant. I have no doubt in my mind that the Respondent having thought of the LIFO policy, that was already in place according to Nielsen, it had already identified those who are to stay. This is fortified by the conduct of the employer to persuade Mr Van Zyl to stay despite his unequivocal rejection of the offers.

[57] It was conceded by Advocate Cook that the letter of 27 January 2006 does not contain certain aspects that are required to be contained in it in terms of the provisions of Section 189 of the Labour Relations Act.

[58] Amongst others, Section 189(3)(b) imposes an obligation on the part of an employer when issuing a written notice to include the alternatives that the employer considered before proposing the dismissals and the reasons for rejecting each of those alternatives. It is common cause that the notice that was issued by Mr Manyama only refers to certain alternatives which would be considered. According to the evidence Mr Manyama, such was going to be considered during the consultation process. I do not think that same is in keeping with the provisions of the Section. It is clear that the purpose of the Section is that before an employer comes to a point of proposing dismissal, it should have considered other alternatives which could avoid a dismissal and also disclose to an employee why, if considered, they have been rejected. This will enable any party who is going to be consulting with an employer to then engage an employer on the reasons why those alternatives were rejected.

[59] It does not avail to an employer to not consider any alternatives and present a proposal to dismiss and only hope to consider the alternatives in the consultation meeting. That in my view is not in keeping with Section 189(3)(b). The wording of the subsection is clear, those alternatives should be considered before proposing dismissal. In other words an employer faced with losses could

probably say let me reduce the number of vehicles, the number of offices or close certain offices. If that is viable, there would be no need for an employer to propose dismissal. But if that is not viable, still an employer is obliged to give reasons why that is not viable to enable an employee to attempt to persuade the employer to change its mind on the rejection.

[60] The Respondent also failed to comply with Section 189(3)(d), which places an obligation on its part to set out the proposed method for selecting which employees to dismiss. It is common cause that the notice contains no proposal in terms of the selection criteria. In my view, it is important for an employer to propose a criteria upfront, so that when an employee goes to a consultation meeting he or she would be able to question the criteria up to a point where a joint consensus could be achieved. It makes no sense for an employee to only know about the criteria when he or she gets into a consultation meeting. There is no way that an employee would adequately participate in the process. In this matter, it is clear that LIFO was preferred by the employer and as Nielsen testified it has been a policy that was there for some time. As to why the Respondent then decided not to include that in their letter of 27 January 2006 escapes my comprehension. When Mr Manyama was confronted about this

apparent non-compliance with the provisions of the law, he relegated it to being a mistake and conceded that it ought to have been included.

[61] As a matter of principle any retrenchment that does not comply with the provisions of Section 189 is procedurally unfair.

[62] An employer has an obligation to disclose in writing all relevant information. It is clear in this matter that the information with regard to the budget and the new structure, was not disclosed to the Applicant in writing. Nowhere in the letter of 27 January 2006 does Mr Manyama hint or make reference to the decisions of Management Committee to adopt a structure and to implement that structure. In cross-examination, Mr Manyama when confronted about the organogram, he testified that he had it in his possession at the consultation meeting. But when he was referred to a request for disclosure in the Pre-Trial Minute, he could not point out why the organogram was not included as information that was disclosed to the Applicant.

[63] The fact that he did not even testify about the budgets can only mean that he has not disclosed that information to the Applicant, which

information was relevant, it being the basis for restructuring. Advocate Cook in his submissions stated that the information was not disclosed because it was not requested. It is not for the Applicant to request that information, but it is the duty of the Respondent to provide that information simply to make the Applicant understand and put in a position to adequately participate in a consultation.

(**See Fawu and Another v National Sorghum Breweries 1997 11 BBLR 1410 (LC)**).

[64] The fact that the budgets were not provided simply means that no explanation was given to the Applicant why his position has since become redundant. Put it differently why was it necessary to reduce the number of Product Managers from four (4) to two (2).

(See **Chothia v Hall Longmore and Company (Pty) Ltd (1997) 6 BLLR 739 (LC)).**

[65] The totality of the evidence points to the fact that when the Applicant went into a meeting with Mr Manyama he already was faced with a *fait acompli.*

(See **Robinson and Others v PriceWater House Coopers (2006) 5 BLLR 504 (LC)**).

[66] Accordingly I find no reason why the Court should not conclude that the dismissal was procedurally unfair, particularly with the concessions made by Advocate Cook that certain provisions of Section 189 were not observed. It therefore follows that such a dismissal would be procedurally unfair.

(See **Johnston & Johnston (Pty) Ltd v CWIU (1998) 12 BLLR 1209** and **Manyaka v Van Der Wetering Engineering (Pty) Ltd (1997) 11 BLLR 1458 (LC)**).

THE ISSUE OF SELECTION

[67] It is apparent that the Respondent just blindly chose to apply LIFO simply because it is generally accepted as a fair criteria. However the evidence point that the Applicant did not truly agree to it as criteria to be applied. Clearly as at the time when the Applicant got into the meeting, Mr Manyama had already applied LIFO to others even before the Applicant came in. It therefore follows that the Applicant was told that the Respondent is going to apply LIFO, it was not agreed upon.

[68] However, a fair criteria should be applied fairly. In this instance it is common cause that the application of the criteria was only limited to

the four (4) Product Managers. Ironically in the Respondent's letter and in the evidence of the Respondent's witnesses at the very least six (6) people were affected. The question becomes why then do you apply criteria of LIFO in respect of Product Managers to the exclusion of the Assistant Product Managers? It is submitted by the Respondent's representative that the two assistants were retained because of their functions. Clearly this shows that the Respondent had then applied a different criteria in retaining the two assistants. What compounds the issue for the Respondent is that if a division as a whole was not performing and costs had to be cut then in fairness the criteria should have been applied to the 1 477 employees.

[69] Even if the Court were to consider only the unit that was headed by Mr Nielsen that criteria had to be applied in respect of 46 employees. It does appear to the Court that the Respondent went to the end of the provisions of Section 189, before it could even provide a fair reason for the dismissal of the Applicant. They wrongfully thought that they will flag LIFO, it being a generally fair criteria, then their selection of the Applicant would be justified despite the fact that there is no evidence to justify the reason for making the Applicant's position redundant. I accordingly find that much as LIFO is generally a fair criteria, the Respondent was inconsistent in its application and that

renders the dismissal substantively unfair. In essence had LIFO been applied fairly and consistently, the Applicant could still be in employment, as it is common cause that the Assistant Product Managers had lesser service. It could also be so that others of the 46 employees also had lesser services than the Applicant. Therefore, dismissal of the Applicant was not the only option available to the Respondent.

RELIEF

[70] The Applicant sought to be compensated as opposed to being reinstated. Since I have made a finding that the dismissal of the Applicant is also substantively unfair, the primary remedy for the Applicant was reinstatement. Since the Applicant has indicated that he does not wish to be reinstated, it therefore follows that the Applicant ought to be compensated. There is uncontested evidence that for a period of eighteen (18) months, the Applicant was without employment. There exist no reason why is it not just an equitable for the Applicant to be awarded maximum compensation.

CONCLUSION

[71] It is clear from the evidence as a whole that the Applicant was treated unfairly in all respects. It is not awaited of employers like the Respondent to disregard the requirements of the law in the manner in which they did in respect of the Applicant. The Respondent had only one consultation meeting after having issued a letter some two days ago. The minutes of that meeting although the Applicant has conceded to certain portions, were drawn up by Mr Manyama and only provided to the Applicant just few days or few weeks before the trial. This is very much unacceptable. Mr Manyama, as an experienced Human Resource Manager, ought to have known how to deal with the processes of retrenchment. In all of this I have borne in mind the fact that the Applicant was not represented and in fact more vulnerable, since Mr Manyama was experienced and he (the Applicant) had no understanding of the processes.

ISSUE OF COSTS

[72] Advocate Cook, properly so, submitted that costs should follow the results. I see no reason why such should not be the case.

[73] In the result I make the following order:-

1. The dismissal of the Applicant is both substantively and procedurally unfair.
2. The Respondent is ordered to pay twelve (12) months compensation to the Applicant calculated at the rate of his salary at the time of dismissal.
3. The Respondent to pay the costs of the Applicant.

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G. N. MOSHOANA

Acting Judge of the Labour Court

Date of Hearing: 13 October 2008

Date of Judgment: 31October 2008

APPEARANCES

For the Applicant: H Strijdom from Helena Strijdom Attorneys

For the Respondent: Adv A Cook

Instructed by Fluxmans Inc.