IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

CASE NO: JS 251/07

In the matter between:

MARTIN LONG	**APPLICANT**
AND	
PRISM HOLDINGS LIMITED	**FIRST RESPONDENT**
NET1 APPLIED TECHNOLOGIES SA LTD	**SECOND RESPONDENT**

JUDGMENT

NYATHELA AJ

Introduction

1] This is an action in terms of which the applicant seeks an order declaring that:

1.1 his dismissal was automatically unfair, alternatively, that his dismissal was a dismissal for operational requirements and is procedurally unfair

1.2 he be reinstated retrospectively to the date of dismissal on the same terms and conditions which applied prior to his dismissal

Alternatively

he be awarded such compensation as is due to him in terms of the LRA,

1.3 further and / or alternative relief;

1.4 costs

The parties

2] The applicant is Martin Long, a former employee of the first respondent.

3] The first respondent is Prism Holdings Limited, a company duly incorporated in terms of the company laws of the Republic of South Africa.

4] The second respondent is Net1 Applied Technologies SA Ltd, a company duly incorporated in terms of the company laws of the Republic of South Africa.

Background

5] The applicant has brought two cases in this application, one being that the reason for his dismissal was a transfer, or a reason related to a transfer and that his dismissal was therefore automatically unfair, alternatively that his dismissal was unfair as contemplated in section 188 of the LRA in that it was not for a fair reason and not in accordance with a fair procedure.

6] The applicant was dismissed for operational requirements on 15 November 2006 following a restructuring processes after second respondent purchased all shares in first respondent on 3 July 2006.

The facts

7] During the third quarter of 2005, some discussions took place between first and second respondent regarding the possibility of combining their business. Following the discussions, second respondent purchased all the shares in first respondent.

8] On 12 June 2006 the Competition Commission SA approved the transaction regarding the purchase of shares between first and second respondents referred to above.

9] On or about 03 July 2006, second respondent acquired the entire issued and outstanding share capital of the first respondent.

10] On 20 September 2006, second respondent published a proposed functional structure of the merged entity and invited comments. The structure reflected Chalmers as the Group HR Manager. Staff members were invited to provide suggestions, comments or proposals regarding the proposed structure on or before 29 September 2006. Applicant did not raise any objection to the proposed structure by the 29 September 2006.

11] On 22 September 2006, applicant compiled a CV and presented it to Kotze (the Group Financial Director of second respondent). Applicant recorded in his CV that he foresaw his future in international operations from an HR perspective and within a broader sphere of HR.

12] During August and September 2006, the applicant attended a number of

meetings which involved the Group Human Resources Manager of second respondent being Mr Chalmers. During the meetings it became apparent that certain employees could loose their jobs and be retrenched. These meetings took place on or about 23 August 2006, 29 August 2006 and 7 September 2006.

13] In one of the aforementioned meetings Chalmers showed applicant a structure of the merged entity. The structure had a vacant position for an HR Manager reporting to Chalmers. The latter suggested that the position could be filled by the applicant.

14] On 20 September and 05 October 2006, Mr Chalmers issued memoranda to all employees of first and second respondents regarding the restructuring of the Net1 Group.

15] On 13 October 2006 Chalmers issued a memorandum addressed to all employees employed by first respondent. The memorandum was e-mailed to applicant with an instruction to distribute it to all employees of first respondent. In the memorandum, Chalmers stated amongst others the following: *"... It has come to my attention that there are a number of concerns circulating at all Prism offices regarding the intergration of Prism into Net1 Group. I will shortly be visiting all areas of Prism in order to:*

- *Meet all the Prism staff*
- *Discuss the intergration of Prism into Net1 Group, particularly from a Human Resources perspective*

- *Discuss areas of concern that you have....".*

16] On 16 October 2006, applicant respondent to the memorandum and stated the following: *"I believe it is appropriate that I join you upon these visits. Pls confirm the dates so that I may make arrangements also".*

17] On 17 October 2006 applicant sent an e-mail to Kotze stating that a week has passed without them meeting to discuss his CV. On 19 October 2006, Kotze responded to the e-mail and stated that he together with one Serge have tasked Chalmers to oversee the new corporate structures and intergration process. He has briefed Chalmers and asked him to pursue the opportunities he (the applicant) had identified within HR as well as international expansion initiatives.

18] On 25 October 2006 in a meeting at applicant's office, Chalmers advised the applicant that there were no vacancies for him at senior level including the international expansion initiatives. He offered applicant a position as Manager Human Resources at R400 000-00 per annum as an alternative to a retrenchment. On 26 October 2006, Chalmers confirmed the discussions with applicant in writing.

19] On or about 03 November 2006, applicant responded to Chalmers aforesaid letter and stated amongst others the following:

"1. On what basis does Net1 intend utilising the Prism retrenchment package in circumstances where it has intergrated Prism and its staff into its structure

2. Your letter refers to a proposed selection criteria of "the best candidate for

the job according to experience, performance and/or qualifications". I have been identified as a possible retrenchee by the company because of the fact that the company does not require two Human Resources Directors. At no stage, and this is evident from the contents of your letter, have the criteria referred to in your letter been applied or explained to me and why in fact you are a better candidate than I am for the position of Human Resources Director...".

20] On 13 November 2006, applicant respondent to a memo dated 09 November 2006 from Chalmers and stated amongst others that he fully accepts that the company can only have one head of Human Resources but what he disputes is the manner in which he was selected as the person to be affected by the retrenchment. He further stated that he does not accept the position which he had been offered in that it is at a much lower rate and level. He does not accept the package attached to the position which had been offered to him.

21] On 13 November 2006 applicant was issued with a retrenchment letter.

Issues to be decided

22] During the court proceedings, parties clarified the issues to be decided to be the following:

Whether the applicant was dismissed as a result of a transfer or a reason related to a transfer as contemplated in section 197 of the LRA thus rendering his dismissal automatically unfair.

Alternatively

Whether the applicant's dismissal was procedurally unfair in that respondent failed to consult with applicant prior to appointing Mr Chalmers to the position of Group Human Resources Director.

Analysis

23] The central issue which I must deal with on the issue of the alleged automatically unfair dismissal is whether a sale of shares in terms of which one company purchases all the shares of another company constitutes a transfer of business as contemplated in section 197 of the LRA and if so, I must determine whether applicant's dismissal was for a reason related to a transfer as contemplated in section 197 of the LRA and thus automatically unfair.

Whether a sale of shares constitute a transfer of business as a going concern in terms of section 197 of the LRA

24] In order to deal with this issue, I have deemed it necessary to first consider the nature of a company and the positions of a shareholder as against the company.

25] Celliers and Benade: Corporate law 3rd edition Butterworths Durban 2000, page 5 para 1.07 states as follows: *"The company, as an association of persons, exists as a separate entity with legal personality from the moment of registration. As a legal person the company is able to acquire rights and duties in its own name. It can, for instance, acquire assets* ***employ employees, be a party to a contract and sue and be sued in court"****.*

26] On page 9 para 1.18, the learned authors stated as follows: *"On its formation, a company, as a separate entity, acquires the capacity to have its own rights and duties". It acquires legal personality and exists apart from its members".*

27] On page 10 para 1.20, the learned authors state as follows: *"Important consequences of the fact that a company is a separate entity existing apart from its members are the following:*

a) The company estate is assessed apart from the estates from individual members; consequently the debts of the company are the companies debts and not those of its members...

b) The profits of the company belong not to the members but to itself. Only after the company has declared a divided may the members, in accordance with their rights as defined in the articles of the company, claim that dividend.

c) The assets of the company are its exclusive property and the members have no proportionate propriety rights therein...

d) *No one is qualified by virtue of his membership, to act on behalf of the company...*

e) *The mere fact that a member holds all the shares in the company, enabling the member to control the company, does not make the company the agent of the member".*

28] It is clear from the above exposition of the law that a company should always be viewed as a separate legal entity existing apart from its shareholders. The fact

that one is a shareholder in a company does not necessarily grant the shareholder direct control of the company in the sense of running the day to day activities of the company. Holding shares in a company only entitles the shareholder to determine who should be appointed as Directors of a company through whom the shareholder can exercise control over the company. The fact that a shareholder acquires all the shares in a company does give the shareholder more control on the company through the Board of Directors but the company continues to exist as a separate legal entity distinct from its shareholder. In simple terms, the acquisition of all the shares in a company does not terminate the existence of a company as a separate legal entity which can act and be sued in its own name.

29] Section 197 of the LRA provides as follows:

"*Transfer of contract of employment. –*

1) In this section and section 197A –

(a)'business' includes the whole or a part of any business, trade, undertaking or service; and

(b)'transfer' means the transfer of a business by one employer '(old employer)' to another employer '(the new employer)' as a going concern.

(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) –

(a) the new employer is automatically substituted in the place of the old

employer in respect of all contracts of employment in existence immediately before the date of transfer".

30] C. Todd et al in Business Transfers and Employment Rights in South Africa Lexis Nexis Butterworths, Durban, page 44 para 2.5.3.1 states as follows: *"Share transfers*

It is clear from the wording of section 197 that the old and new employers must be two separate entities. It is for this reason that the section will not apply where control of a business is transferred by way of a share transfer. In such cases control is shifted, but the legal identity of the employer remains the same".

31] In *Ndima & others v Waverly Blankets Ltd (1999) 6 BLLR 577 (LC)* at page 591 para 66, the court per Zondo J (as he then was) stated as follows: *"I am unable to agree with Mr Brassey that the transfer of possession and control of a business is sufficient to bring the applicants within the ambit of section 197. Quite clearly, the section requires the transfer of business in order for its operations to be triggered. The transfer of business and transfer of possession and control of a business are two separate concepts. I do not think that any justification can be found in the provisions of section 197 for stretching the meaning of transfer of business that far".*

32] I agree with the reasoning in the Ndima case referred to above. As pointed out in para 28 above, the fact that a shareholder acquires all the shares in a company does not grant he shareholder any rights to deal directly with the affairs of the

company since the company continues to exist as an independent juristic person despite the change in shareholding. The shareholder therefore does not have a right to deal with the day to day management of a company directly. Acquiring all the shares of a company therefore does not make the shareholder the new employer since the company continues to exist as a separate legal entity and employer of its employees. A transfer of shares will therefore not fall within the ambit of a transfer of a business as a going concern as provided in section 197 of the LRA.

33] In this matter, there is no dispute that second respondent purchased all the shares of first respondent hence applicant contends that the transaction is a transfer of a business as a going concern in terms of section 197 of the LRA and the provisions of the section should therefore apply to his dismissal.

34] In view of my conclusion in para 32 above, I find that the provisions of section 197 of the LRA cannot apply to applicant's dismissal.

35] The second issue which I must deal with is whether the dismissal of the applicant for operational requirements was procedurally fair or not

36] Section 189 of the LRA provides as follows: *"Dismissals based on operational requirements. –*

1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult-

a) *Any person whom the employer is required to consult in terms of a collective agreement;*

b) *If there is no collective agreement that requires consultation –*

   i) *a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and*

   ii) *any registered trade union whose members are likely to be affected by the proposed dismissals;*

c) *if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, by the proposed dismissals; or*

d) *if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.*

2) *The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on –*

a) *Appropriate measures-*

   i) *to avoid the dismissals;*

   ii) *to minimise the number of dismissals*

iii) to change the timing of the dismissals; and

iv) to mitigate the adverse effects of the dismissals;

b) the method for selecting the employees to be dismissed; and

c) the severance pay for dismissed employees

3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to-

a) the reasons for the proposed dismissals;

b) the alternatives that the employer considered before proposing the dismissals; and the reason for rejecting each of those alternatives;

c) the number of employees likely to be affected and the job categories in which they are employed;

d) the proposed method for selecting which employees to dismiss;

e) the time when, or the period during which, the dismissals are likely to take effect;

f) the severance pay proposed;

g) any assistance that the employer proposes to offer to the employees likely to be dismissed;

h) the possibility of the future re-employment of the employees who are dismissed;

i) the number of employees employed by the employer; and

j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months".

37] In *Johnson &Johnson (Pty) Ltd v CWIU (1998) 12 BLLR 1209 (LAC) at para 27,* the court stated as follows: *"The important implication of this is that a mechanical, checklist kind of approach to determine whether section 189 has been complied with is inappropriate. The proper approach is to ascertain whether the purpose of the section (the occurrence of a joint consensus seeking process) has been achieved (authorities omitted)".*

38] In *Visser v Sanlam (2001) 3 BLLR 313 (LAC) at page 319 para 24* the court held that *"The process of consultation envisaged in section 189(2) involves a bilateral process in which obligations are imposed upon both parties to consult in good faith in an attempt to achieve the objectives specified in the section. In my view, the respondent fulfilled its obligations in terms of section 189(2). If any conclusion is justified, it is that appellant failed to engage adequately in the consultation process envisaged in the section. Accordingly, it cannot be said that the retrenchment of appellant was procedurally unfair".*

39] In *NEHAWU & others v University of Pretoria (2006) 5 BLLR 437 (LAC)* at page 454 at para 60, the court held that *"The fact that the union participated in the process that took place between February and November 1997 and that it was free to suggest or to propose whatever it wanted to suggest or propose means that, since the union did not suggest at the time that the process be*

conducted any differently, it cannot now be heard to complain that the process should have been dealt with differently".

40] At para 62, the court proceeded to state as follows: *"In any event, if the union felt that too much work had been done during the pre-november 1997 process which should have been done during the post-november consultation process, it was always open to it to ask for more time to either carefully examine such work or to undertake its own investigation to contradict the result of the pre-november investigation. It did not do so and cannot be heard to complain".*

41] In this matter, it is common cause that on 03 July 2006 first and second respondents concluded an agreement. It is on the basis of this agreement that employees of second respondent held meetings with applicant and issued memoranda to employees of first respondent.

42] It is clear from the decision in Johnson & Johnson referred to above that in determining compliance with section 189 of the LRA the court is more concerned with whether on the whole, there was substantial compliance with the consultation process. In this regard, the seniority of the employee, his participation in the consultation process, the information shared with the employee as well as the input he made throughout the consultation are relevant considerations.

43] In this matter, applicant was employed as Director: Human Resources which is a very senior position. Applicant thus had an understanding of restructuring and retrenchments as these formed part of his responsibilities by virtue of his

employment.

44] It is not in dispute that applicant held several meetings with Chalmers during which the issue of restructuring and possible retrenchments were discussed. However what is crucial is that on or about August or September 2006 Chalmers showed applicant a copy a copy of a new structure. The structure only had a post of Manager Human Resources which reported directly to Group Human Resources Director a position held by Mr Chalmers. Applicant therefore was aware that his position was redundant and thus he was likely to be retrenched.

45] Applicant does not dispute that on 25 October 2006 Chalmers offered him the position of Manager Human Resources as an alternative to retrenchment and that he did not accept the said position. This is supported by applicant's letter dated 03 November 2006.

46] It is further not disputed that on 22 September 2006 applicant then submitted his CV to Kotze, in which he indicated that he was interested in international operations from HR perspective and within a broader sphere of HR within the group. In my view, applicant made this proposal as an alternative to retrenchment as he was aware that his position was redundant. Unfortunately Kotze could not find any vacant position which applicant could occupy in line with his proposal.

47] It is clear from the above interaction between applicant and Chalmers as well as between applicant and Kotze that applicant was an active participant in the consultation process. Chalmers made a proposal to him regarding an alternative

position which he could occupy and applicant rejected the proposal. Applicant instead made his own proposal which unfortunately could not resolve the issue as there were no vacant positions in line with his proposal.

48] What is remarkable is that during the interactions referred to above, applicant never made a proposal that he could occupy the position of Group Human Resources Director which was given to Chalmers. This issue is crucial in view of applicant's seniority as well as the fact that issues of restructuring and retrenchments fall within his portfolio as Director: Human Resources. Moreover it is evident from the submissions by the parties that Chalmers was more senior and experienced than applicant. This probably influenced applicant's decision not to even propose the position of Group Human Resources Director as an alternative position for him as he considered Mr Chalmers to be the most appropriate person to occupy the position.

49] In the circumstances, I agree with the decision in NEHAWU & others v University of Pretoria that a party to a consultation process cannot complain about the fairness of the consultation when he did not raise the issues which are the cause of his complaint during the process itself. In the present matter, applicant had no problem with the fact that Chalmers had been given the position of Group Human Resources Director throughout the consultation process. It was only after his proposals have not been accepted that he started raising the issue of Chalmers appointment. This cannot be a valid ground to challenge the procedural fairness of applicant's dismissal.

Order

50] In the premise I make the following order:

(i) The applicant's dismissal does not constitute an automatically unfair dismissal.

(ii) The applicant's dismissal for operational reasons is procedurally fair.

(iii) Applicant's is ordered to pay respondent's costs.

Nyathela AJ

Date of Hearing : 11,12,13,14,15 May, 01and 03 June 2009

Date of Judgment : 3 February 2010

Appearances

For the Applicant : Adv M.A Wesley

Instructed by: Parrot Van Niekerk Woodhouse Matyolo Inc.

For the Respondent: Adv. A.T Myburg

Instructed by: Fluxmanns Inc.