



REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR APPEAL COURT OF SOUTH AFRICA, HELD IN JOHANNESBURG

JUDGMENT

Case no: JA 39/10

In the matter between:

MARTIN LONG

Appellant

and

PRISM HOLDINGS LIMITED

First Respondent

NET 1 APPLIED TECHNOLOGIES SA LTD

Second Respondent

Heard: 17 August 2011

Delivered: 06 March 2012

Summary: alleged automatically unfair dismissal for reason related to the transfer of a business as a going concern; acquisition of shares does not amount to transfer of a business as a going concern; dismissal of appellant substantively fair for operational requirement but procedurally unfair; appellant granted compensation equivalent to three months remuneration and 50% of his costs.

CORAM: WAGLAY, DJP, DAVIS JA *et* SANDI AJA

JUDGMENT

SANDI AJA:

- [1] On 15 December 2006, the appellant, Mr. Long (“Long”), was dismissed from employment for alleged operational reasons. Long referred a dispute to the Commission for Conciliation, Mediation and Arbitration (“CCMA”) alleging that his dismissal was automatically unfair in terms of the provisions of section 187 of the Labour Relations Act (“the LRA”)¹ for the reason that it was related to the transfer of a business as a going concern in terms of section 197 of the LRA. In the alternative, Long alleged that his dismissal was unfair. Conciliation failed and Long referred the dispute to the Labour Court. The Labour Court dismissed his claim with costs. This is an appeal, with the leave of the court *a quo*, against the whole of the judgment and order of the Labour Court.

Factual Background

- [2] Long was employed by the first respondent, Prism Holdings Limited (“Prism”), as a Human Resources Director as from 1 November 1998. On 3 July 2006, the second respondent, Net 1 Applied Technologies SA Ltd (“Net 1”), acquired the whole of the shareholding of Prism in terms of section 311 of the Companies Act.² Thereafter the two companies still remained separate legal entities. One Mr. Chalmers (“Chalmers”) was the Group Human Resources Manager of Net 1, a position he occupied as from 1 April 1998.
- [3] Prism was involved in the business of electronic payments. Some of the major retailers were its customers. It supplied them with credit card terminals and the software necessary to operate those credit card terminals.

¹ 66 of 1995.

² 61 of 1973.

- [4] Net 1's major business was Cash Paymaster Services which was contracted by the government to pay social grants. Cash Paymaster Services had issued about 4 million smart cards which were used at smaller retailers only.
- [5] The evidence tendered on behalf of Net 1 was that, its acquisition of Prism would enhance its business in that after the acquisition, its smart cards would be used at major retailers, such as Pick'n Pay and Shoprite. In other words, Net 1's 4 million cardholders would be able to make purchases at all major retailers who are using Prism's technology. In that way, Prism's business complemented that of Net 1.
- [6] It was common cause that Net 1 was five times the size of Prism and had some 2000 (two thousand) employees, while Prism had about 280 (two hundred and eighty) employees.
- [7] After the acquisition of Prism, a process of integration and restructuring followed. The reason for this being the fact that certain business units (such as Human Resources) in both Net 1 and Prism were performing the same functions. They had to be integrated. The positions of human resources managers held by Chalmers and Long were merged.
- [8] On 20 September 2006, Chalmers circulated a memorandum to all members of staff. Attached to the memorandum was a proposed new group structure. Each staff member was invited to comment or make proposals on the structure before 29 September 2006. In the proposed structure, Chalmers was reflected as the group HR Manager. Long's name did not appear on the proposed structure.
- [9] On 22 September 2006 and at the suggestion of Mr. Els ("Els"), the Chief Executive Officer of Prism, Long submitted his *curriculum vitae* to the head of finance, Mr Kotze ("Kotze") which set out his experience and functions as human resources manager at Prism. Long did not comment on the position to which Chalmers was appointed. He stated the following:

'The big vision of Net 1 is an exciting one and, given the above, one in which I feel I am adequately capable of assisting the progress and success in a senior capacity. Given the expansive nature and vision I foresee many challenges with the establishment of 'international' operation from a HR perspective and perhaps with this the broader sphere of HR there are specific avenues and opportunities for myself to have contributed substantially to the continued success in a senior capacity - as I have been proud to have done that thus far.'

- [10] Long testified that after the publication of the proposed structure on 20 September 2006, he attempted unsuccessfully to contact Kotze in order to explain to him why he was of the view that he should be the HR Manager in the position occupied by Chalmers.

- [11] On 05 October 2006, the proposed structure was confirmed by the executive committee and it was circulated to all members of staff after certain amendments had been effected to it. Again, Long's name was not reflected on that structure.

- [12] On 09 October 2006, Chalmers circulated a memorandum to the staff at Prism advising that, as part of the integration and restructuring process, Prism's head office situated at Four Ways would be closed and that the Prism staff that could be accommodated in the new Net 1 structure would be moved to Net 1's head office in Rosebank. Those who could not be accommodated faced the possibility of retrenchment or being placed elsewhere in the Net 1 group. This memorandum was first sent to Long for his comment.

- [13] On 10 October 2006, Kotze, Chalmers and Long held a meeting at which Long presented his C.V and commented on the memorandum sent to him by Chalmers on 09 October 2006. At that meeting, Long did not discuss the selection of Chalmers as HR Manager. In his evidence he said it would not have been appropriate to do so in Chalmers presence. Kotze testified that by this date, Chalmers had already been appointed to the position of Manager and that it was inevitable that Long would not be appointed to that position. Under cross-examination, Kotze conceded that in those circumstances Long

had to be dismissed unless an alternative position could be found for him.

- [14] On 12 October 2006, Chalmers prepared a draft notice of contemplated retrenchment with the intention of circulating it to all staff members. Before its circulation, Long was given an opportunity to comment on it. The notice mentioned the possibility of retrenchment of some staff members. Long was not happy with the notice and made suggestions as to how it should be structured. He also preferred that the affected employees be addressed individually. The said notice was issued by Chalmers on 13 October 2006 in a revised form as suggested by Long. It stated that the heads of departments listed on the approved organogram dated 05 October 2006 were considering the resources requirements of the units for which they had been appointed.
- [15] On 17 October 2006, Long wrote to Kotze requesting a meeting to discuss the proposals he had made in his C.V. Kotze advised Long that he had asked Chalmers to “pursue the opportunities” that Long had identified in his C.V. On 20 October 2006, Chalmers visited Long in his office and informed him that Kotze had given him the task to investigate the opportunities he had identified in his CV.
- [16] At a meeting held between Long and Chalmers on 05 October 2006, the following was discussed:
- ‘No opportunities were available to Long at a senior level, including Net 1’s international initiatives, the only position Chalmers could offer Long was that of Human Resources Manager under him and at half his salary, and that in the event that no alternatives were available Long’s retrenchment was unavoidable. As an alternative to dismissal, Long proposed that he be placed at the position of HR Manager suggested by Chalmers at his current salary which would be frozen for sometime until it became market-related. Net 1, was not prepared to accept this proposal.’
- [17] After the meeting, Long telephoned Chalmers requesting reasons why they were not able to offer him a position in their international initiatives. Chalmers replied advising that there were no positions available at his current salary

and that no dedicated HR Manager was required. Long requested to be furnished with certain documents and information.

- [18] In his letter of 09 November 2006, Chalmers furnished the information and documents requested. He further explained why he had been appointed to the position of head of Human Resources. In response to this letter, Long said he accepted that only one head of Human Resource was required by the company. He, however, objected to the manner in which Chalmers was appointed. He disputed that Chalmers satisfied the requirements for the appointment to the senior position.
- [19] On 15 November 2006, Long received a notice advising him that ‘... your current position has become redundant and that your services will be terminated because of the Company’s operational requirements.’ The dismissal was effective from 15 December 2006.
- [20] On 12 December 2006, Long referred a dispute to the CCMA. After conciliation could not resolve the dispute, Long referred the matter to the Labour Court.
- [21] At the trial, Long and his witnesses gave evidence. Net 1 led the evidence of Chalmers and Kotze.
- [22] Before the Labour Court, Long sought an order declaring that:
- a) his dismissal was automatically unfair in that he was dismissed as a result of a transfer or a reason related to the transfer of a business as a going concern,
 - b) in the alternative, that his dismissal was unfair for failure to comply with the provisions of section 189 of the LRA. He asked for reinstatement, alternatively, compensation.
- [23] The Labour Court dismissed Long’s claim with costs.

Analysis of the evidence

- [24] It is significant that Long did not comment, object or make a counter-proposal when invited to do so at the time the new structure was proposed. The proposal stated that the Executive Committee of Net 1 had taken a decision to investigate, amongst others, the integration of 'Prism into the Net 1's operation.' An organogram was furnished to Long which reflected Chalmers as the Head of the new proposed business unit of human resources. The proposal was made on 20 September 2006 and the deadline for comment or proposals was 29 September 2006. On 22 September 2006, Long furnished his *curriculum vitae* to Kotze in which he made no comment about Chalmers being proposed to be the new head of human resources. Instead, he saw himself as being suitable to some other position in the international operations of Net 1 and the "broader sphere" of human resources. He was silent about the proposed appointment of Chalmers to the position of the HR manager.
- [25] Even after publication of the final structure on 05 November 2006, Long did not make any move to object or challenge Chalmers appointment until after he was told (on 26 October 2006) that the position in which he wanted to be appointed was not available.
- [26] I find it difficult to understand why a person in his position would not have taken steps at the earliest available opportunity to have made his position known to Net 1 that it was his desire to be appointed to the position held by Chalmers.
- [27] Kotze's evidence makes sense to me. Chalmers was the right person for the job. He had a good track record within the Net 1 group and was more experienced than Long. In his evidence, Long conceded that Chalmers had longer service than he did. His conduct seems to indicate that he accepted that Chalmers position was not available to him.

Whether the dismissal was automatically unfair by virtue of section 187 reads together with section 197 of the LRA.

[28] Section 187(1)(g) provides that 'a dismissal is automatically unfair if the employer in dismissing the employee, acts contrary to section 5 or, if the reason for dismissal is -

(g) a transfer or a reason related to a transfer, contemplated in section 197 or 197A. Transfer, as defined in section 197(1) means "the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.'

Section 197 (2) provides as follows:

'(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;

(b) all the rights and obligations between the old employer and an *employee* at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the *employee*;

(c) ...

(d) ...'

[29] The evidence which has not been challenged is that Net 1 acquired all the shares in Prism and that the two remained separate legal entities. Net 1 exercised control over Prism and designed its policies.

[30] The question to be answered is whether, in these circumstances, Prism was transferred to Net 1 as a going concern in terms of the provisions of section 197 of the LRA.

[31] Before acquisition Net 1 and Prism were not in competition with one another. Each entity carried out its business in its own field. Kotze testified that these

two businesses complemented each other. Each entity retained its assets.

[32] In *Ndimma and Others v Waverly Blankets Ltd*,³ Zondo J (as he then was) stated that the transfer of 'possession and control of a business' are two 'separate concepts' - and that transfer of possession and control do not trigger the operation of section 197 of the LRA. In *National Education Health and Allied Workers Union v University of Cape Town and Others*,⁴ the Constitutional Court held that 's 197 is for the benefit of both employers and workers. It facilitates the transfer of business while at the same time protecting the workers against unfair job losses.

[33] Todd et al, state that:

'It is clear from a wording of section 197 that the old and the new employers must be two separate entities. It is for this reason that the section will not apply where control of the 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. Of course, the change in the proprietor of the share capital might be considered just as important to employees as a change in employer following a transfer of a business. The new owner of the share capital may wish to introduce major changes in order to make the business more profitable. That might impact on employees' terms and conditions of employment and the manner in which they work. But even if the envisaged changes are significant there would appear to be no reason why section 197 should apply where there is a change in the control of the enterprise, but the employer stays the same. The employees are not in danger of losing their employment because there has been a share transfer. There is no need to provide for the transfer of contracts and rights and obligations because they never resided anywhere other than between the exiting employer and its employees. Nor is there any inherent danger of a change in employment conditions as a result of a share transfer. Of course, the employer, under new direction, is entitled to make changes to the employment relationship by way of negotiation, lock-out or ultimately dismissal. Treating the transferor of shares as an 'old employer' and the share transferee of shares as a 'new

3 (1999) 6 BLLR 577 (LC) at 591, para 66

4 (2003) 24 ILJ 95(CC) at para 70.

employer' would, apart from being illogical, only have the effect of binding the new controller of the business to respect employees' terms and conditions of employment for a while after the transfer before it can amend them in the normal course.'⁵

- [34] My view which is in line with the reasoning of Zondo J in *Ndimma (supra)* is that the acquisition of shares by Net 1 from Prism did not amount to the transfer of business from one employer to another as set out in section 197 of the LRA. See too: *Schutte and Others v Powerplus Performance (Pty) Ltd and Another*.⁶ The identities of the entities remained the same and the employees are able to enforce their rights.
- [35] From the evidence, it is clear that the reason for the dismissal of Long was the operational requirements of Net 1. In order to determine whether section 197 applies, the question that has to be asked is whether the probable cause of the dismissal was the transfer of the business as a going concern or a reason related to such transfer. See: *SA Chemical Workers Union and Others v Afrox Ltd*.⁷
- [36] On a conspectus of the evidence, Long failed to show that the probable cause of his dismissal fell within the provisions of section 187(1)(g) of the LRA. On the other hand, Net 1's evidence to the effect that Long's dismissal was for operational reasons is more probable.
- [37] From what is stated above, I conclude that the dismissal of Long does not fall within the ambit of the provisions of section 187(1)(g) of the LRA. It follows that the Labour Court was correct in dismissing this leg of Long's claim.

Alleged unfair dismissal

- [38] As the circumstances of the present case demonstrate, in the majority of cases, acquisition of one entity by another invariably results in the integration

⁵ [Chris Todd](#), [Darcy Du Toit](#), [Craig Bosch](#) *Business Transfer and Employment Rights in South Africa* (LexisNexis Butterworths, 2004).

⁶ [1999] 2 BLLR 169 (LC) at para 32.

⁷ (1999) 20 ILJ 1718 LAC at para 46-49.

and restructuring of the workforces. In that process, some employees become redundant, unless alternative employment can be found for them. If this cannot be achieved, their dismissal for operational reasons is unavoidable.

- [39] The evidence on behalf of Net 1 was that Long was dismissed for reasons based on the operational requirements of Prism. The integration of certain business units of Net 1 and Prism had to take place and a duplication of functions within these units had to be eliminated if Prism was to be financially viable.
- [40] Only one HR manager was required to serve both Net 1 and Prism. Long conceded this.
- [41] Net 1 appointed Chalmers to the position of HR manager without any objection having been raised by Long despite invitation by Net 1 to do so.
- [42] As early as 22 September 2006, Long's conduct was such as to give a clear impression that he had no interest in Chalmers' position. Instead, he identified other positions where he could be fitted in. His belated objection to Chalmers' position was made long after Chalmers had assumed that position and Chalmers' appointment was irreversible.
- [43] Looking at this matter objectively, Long was in any event not a suitable candidate for the HR director occupied by Chalmers, in view of the latter's experience in the job. Besides, Net 1 was satisfied with the performance of Chalmers. The same cannot be said about Long. Net 1 could not see its way clear in entrusting the combined HR positions to him in view of his limited experience.
- [44] No alternative vacancies were available save the position of HR manager falling under Chalmers, which he refused to accept.
- [45] In the circumstances, I conclude that Long's dismissal was fair.

Procedural Fairness

[46] In *Unitrans Zululand (Pty) Ltd v Mhambiseni Johnson Cebekhulu*,⁸ Zondo JP stated that:

‘With regard to procedural fairness, the question is not whether a fair procedure was followed in Court. The question is whether, prior to the dismissal, the employer followed a fair procedure.’

[47] The evidence shows that Long appreciated that retrenchments were going to take place at Prism. Chalmers even invited him to comment on a draft memorandum to be circulated to staff members. Among others, the draft memorandum stated those staff members who could not be accommodated by Net 1 were to be retrenched. He has himself to blame for not having participated and asserted his position when given an opportunity to do so.

[48] Long sought to challenge Chalmers’ appointment to the position of HR manager after confirmation of the latter’s appointment.

[49] Thereafter he was dismissed from employment.

[50] His main complaint was the manner in which Chalmers was appointed.

[51] To my mind, Prism did not comply with its obligation to consult with Long before Chalmers was appointed. Long had a right to be consulted in the manner set out in section 189. Long was correct in stating that he had not been advised as to what selection criteria were applied in the appointment of Chalmers.

[52] The evidence shows overwhelmingly that before Long’s dismissal Net 1 did not employ a fair procedure.

Remedy

[53] In these circumstances, Long is entitled to compensation by Net 1 for its failure to conform to a fair procedure.

⁸ [2003] 7 BLLR 688 (LAC) at para 25.

Costs

[54] Counsel submitted that if Long is successful on appeal he should be awarded his costs both in this Court and in the court below. In the alternative, he submitted that in the event that Long is unsuccessful, this Court should reverse the costs orders issued by the court *a quo* and order each party to pay its own costs in this Court and in the court below.

[55] In my view, Long has been substantially successful in this matter. In the exercise of this Court's discretion, there appears to be no reason why he should not be awarded 50 % of his costs. Net 1 flagrantly disregarded the provisions of section 189 of the Labour Relation Act, which has been the subject of interpretation in many decisions of this Court.

[56] In the result the following order is made:

1. Paragraph (i) of the order issued by the Labour Court is confirmed;
2. Paragraphs (ii) and (iii) therefore are set aside and are replaced with the following:
 - a) Applicant's dismissal was for a fair reason related to the respondent's operational requirement;
 - b) In dismissing the applicant the respondent did not follow a fair procedure;
 - c) The respondents are to pay the applicant the equivalent of three months' remuneration;
 - d) The respondents are to pay 50 % of the applicant's costs on appeal as well as in the labour Court.

Sandi AJA.

I agree

Waglay DJP

I agree

Davis JA

APPEARANCES:

FOR THE APPELLANT:

Adv. M.A Wesley

Instructed by Perrot van Niekerk Woodhouse
Matyolo Inc

FOR THE RESPONDENT:

Adv. W Hutchison

Instructed by Fluxmans Inc