

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO : C312/98

In the matter between :

INSURANCE AND BANKING STAFF
ASSOCIATION (IBSA)

First Applicant

HEATHER PAULSEN

Second Applicant

NICHOLAS DAMANE

Third Applicant

PENNY CLARK

Fourth Applicant

CHANTAL STANDER

Fifth Applicant

and

S A MUTUAL LIFE ASSURANCE SOCIETY

Respondent

JUDGEMENT

JAJBHAY, A.J. :

[76] In this matter, I was called upon to determine whether the dismissal of the Second, Third, Fourth and Fifth Applicants ("the individual Applicants") was effected for a fair reason and in accordance with a fair procedure.

BACKGROUND

[76] The individual Applicants were all employed in the Employment Services Department which is part of the Human Resources Division of S A Mutual Life Assurance Society ("Respondent").

[76] It is common cause that the individual Applicants were dismissed

by the Respondent, allegedly on the basis of the operational requirements of the Respondent's business, on 31 May 1998. The last day of their employment was on the 13th of March 1998, and the individual Applicants were paid until the end of their notice period at the end of May 1998.

[76] The Respondent has operated for many years as a mutual society, offering a range of life insurance and pension benefits, investment products and financial services.

[76] At the time of the dismissal, the Respondent was being re-organised from a structure which consists of divisions with various departments in each division into a range of divisions, departments and business units, each with its own customer segment and profit accountability.

[76] Each division, department and business unit has specific functions and had to provide a specific and specialised service to the Respondent's clients, both internal and external.

[76] The Employment Services Department ("Employment Services") is a department within the Human Resources Division. The primary function of Employment Services was to ascertain the staff recruitment needs of the Respondent, to advertise available posts and positions both internally and externally, and to select and recommend suitable candidates for the filling of any vacancies.

RESPONDENT'S EVIDENCE

[76] Prior to February 1998, several divisions, departments and business units of the Respondent expressed dissatisfaction with the functioning, advice and service offered by Employment Services. The dissatisfaction included :

- e. allegations that Employment Services had an inadequate understanding of client needs;
- e. allegations that Employment Services was following certain processes and procedures in a mechanical fashion which resulted in problems relating to the recruitment and recommendation of inappropriate candidates for the filling of vacancies;
- e. the furnishing of inadequate advice by Employment Services including a failure to properly screen applicants;
- e. excessive delays in the filling of vacancies by Employment Services;
- e. the failure of Employment Services to proactively anticipate client's needs in a rapidly changing environment.

[76] The evidence further established that the Respondent has and continues to undergo various fundamental changes, that resulted from the preparations for the proposed demutualisation and listing of the Respondent as well as a concerted effort, by the Respondent to restructure itself to achieve a greater focus on client needs (both internal and external), to develop specific structures and capabilities to suit particular needs, to focus on emerging sectors of the economy and to properly and adequately compete in the global economy. The changes that I have alluded to above, had several inevitable consequences. These included various measures, adopted by the divisions, departments and business units, to increase their efficiency and profitability.

[76] Consequently, several of the Respondent's divisions, departments and business units were converted to separate companies, and incorporated under the provisions of the Companies Act. This resulted in their operating more autonomously.

[76] It was stated in evidence that the changes within the Respondent were known to the Respondent's employees which included the individual Applicants as well as the Insurance and Banking Staff Association (IBSA). IBSA is a registered trade union and was duly authorised to represent the individual Applicants in these proceedings.

[76] Employment Services, as a result of the dissatisfaction expressed by its clients, lost a number of key clients including Old Mutual Properties, Old Mutual Asset Management, Information Services Division. These clients indicated that due to reasons such as the Employment Services' lack of knowledge in the Information Technology Department, coupled with the time that was taken to fill vacancies, they considered the utilisation of outside consultants to meet their recruitment needs, or alternatively they would employ the necessary staff themselves.

[76] The management at the Respondent's Human Resources Division, informed by the circumstances set out above, formed the view that Employment Services should be restructured as a matter of urgency. If this was not done, the viability of the department would be at stake. As I understood the evidence, the primary aim of such restructuring was to provide a wider range of appropriate and efficient services in order to meet and solve concerns raised by clients.

[76] A proposal regarding the restructuring was conveyed for the first time to employees within Employment Services on the 13th of February 1998. The proposal entailed ***inter alia***, that each employee in Employment Services submit certain documentation to a selection panel which would then interview and evaluate each employee to ascertain their suitability for the various positions envisaged, following upon the suggested restructuring in the Employment Services Department. Where a candidate was not successful, such a candidate would be placed on a redeployment list with a

view to placing the candidate in an alternate position were such a position available, with the Respondent. Alternatively, in terms of the proposed restructuring, the employee could elect immediately to receive the employee's severance package.

[76] The following extract is important for the purposes of the present matter, which is the introductory paragraph in the proposed restructuring document

"For some time now Employment Services has received negative feedback regarding the services that it provides. This is confirmed in both the findings of the Perry Report of October 1995, which refers specifically to Employment Services' inability "to meet the clients' needs", as well as the insufficient focus on "black recruitment". More recently, this was reconfirmed by the client survey conducted in March 1997. This survey showed that Employment Services rated the most poorly of all the departments in Human Resources regarding its services to clients."

"Further dissatisfaction was also expressed by the IT community, in a forum (held in September 1997) chaired by Vic Lumby, which criticised the inability of Employment Services to provide a value-added service."

[76] In terms of the minutes of the meeting held on the 13th of February 1998, and in response to a question raised by the employees, as to whether the exercise was to cut costs and *"therefore have heads rolling"*, it was stated that this exercise was not a cost issue. The exercise was *"to upgrade the level of service provided by this unit, and other suggestions are welcome"*.

[76] At this meeting, it was suggested as an alternative that *"sufficient training be provided to each person of this unit before going through the suggested restructuring process"*. In response to the suggested alternative, the management delegate stated that *"This would be considered as an option and had been noted."*

[76] The management delegate, had continually stressed at this meeting that *"the intention was not to drag the process out and therefore traumatise and stress people unnecessarily. The issues on hand has to be dealt with as quickly and effectively as possible."*

[76] It was common cause that meetings with regard to the process took place on the following dates up to the last day of the service of the individual Applicants : 13 February 1998; 20 February 1998; 23 February 1998; 2 March 1998; 4 March 1998; 9 March 1998; 11 March 1998 and 13 March 1998.

[76] The employer's case then proceeded to set out that a process of consultation thereafter occurred. The individual Applicants as well as IBSA participated in the process of consultation, to a certain point in time. It was

testified that the Applicants thereafter refused to further participate in the consultation process and further refused to submit any documentation or applications to the selection panel, or to be interviewed to enable the Respondent to assess the positions of the individual Applicants with regard to the restructured department.

[76] It was common cause that all the remaining employees save for the individual Applicants in Employment Services continued to participate in the consultation process. Such other employees submitted applications and documentation and attended interviews which ultimately enabled the employees to be assessed. All the employees who participated in the steps set out by the employer, were placed within the restructured Employment Services Department.

[76] The Respondent's case was that as a direct result of the refusal of the individual Applicants to participate in the process of further consultation and their refusal to take the steps as were necessary to enable the Respondent to consider their placement within the restructured department, Respondent was unable to determine whether the individual Applicants should be placed in the restructured department, and if so, in what posts. The individual Applicants were, in the circumstances, informed that they did not have to report to work on Monday, 16th March 1999. Pursuant to the Respondent's policy to allow a two calendar month redeployment period, which in the case of the Applicants, ended on the 30th of May 1998.

[76] Subsequently, the Respondent in an endeavour to settle the dispute that existed with the individual Applicants offered to attempt to redeploy the individual Applicants on certain terms and conditions, which included :

"1. That the Applicants were not redeployed in the Employment Services area but elsewhere within the organisation;

2. That there was no guarantee that such redeployment would be successful;

3. That only ad hoc access would be granted over the two month period during which the redeployment exercise would take place;

4. The employees would be paid an ex-gratia amount equivalent to two month's salary during the redeployment period."

[76] The individual Applicants were not prepared to accept such an offer.

[76] The Applicants in this matter did not tender evidence nor was any evidence led on their behalf.

JOB CONTENT BEFORE AND AFTER THE RESTRUCTURING

[76] From the evidence tendered on behalf of the Respondent, I make the following observations with regard to the restructuring :

a. The "*old*" and "*new*" structures set out in the proposed restructuring process document, are essentially the same and in my view, the jobs have merely been renamed.

e. Of the eight incumbents who reapplied for the positions in the "*new*" structure, all were reappointed. Upon a proper consideration between the "*old*" and "*new*" jobs, it appeared that they were doing essentially the same work after the restructuring as they had been prior to 13 February 1998.

e. In answer to a question as to how the new recruitments had acquired new skills and managed to perform adequately after the restructuring, Ms Griffiths who testified on behalf of the Respondent, and who was the manager at Employment Services at all material times, replied that these individuals were expected to fill the new roles and subsequently attended training. With regard to Peggy Mpangela, who was employed as a receptionist in the old structure, she received "*on the job*" coaching and support.

e. Ms Griffiths conceded under cross-examination that one of the employees who served as "*clerical*" recruitment specialist under the old structure was appointed as clerical staff specialist under the new structure. Ms Griffiths further testified that the changes in their respective roles were that they had to work more closely together and develop a pool of applicants; they had to further understand the clients' needs; and they had to tap and source potential recruits. According to Ms Griffiths, Nwabisa Muthige tapped into potential recruits by joining the Black Managers Forum.

e. Of importance was the concession on the part of Ms Griffiths that the individual Applicants could have easily attended to all of these functions under the new structure.

e. Ms Griffiths further testified that the fundamental difference within the new structure was "*how the staff went about performing their functions*".

REDUNDANCY OF JOBS

[76] Mr Alexander (who was Ms Griffiths predecessor in Employment Services Department during the time February 1997 to October 1997) testified that Employment Services needed to employ more recruitment consultants to deal with the time that it took to fill vacancies. In fact two additional staff members were appointed at the commencement of Mr

Alexander's management period and another at the end of his term.

[76] Employment Services was in fact employing individuals one month before the restructuring programme was furnished to the individual Applicants.

[76] There was not a great difference between the old and existing jobs.

[76] Ms Griffiths further conceded that some of the new functions of recruitment consultants in terms of the new structure, for example graduate recruitment, affirmative action programmes and maintaining a database of job applicants, were already being carried out by the incumbents prior to the restructure.

[76] Ms Griffiths further confirmed that after informing the individual Applicants that their services were not required on the 13th of March 1998, she appointed two contractors to attend to the roles of the Fourth and Fifth Applicants.

WORK OVERLOAD

[76] According to the evidence, there was no doubt that the recruitment consultants were burdened with an overloaded task. At one of the forum meetings, Ms Griffiths confirmed that the number of recruitment consultants should increase due to the work overload in the department. She further testified that she had recommended the appointment of four additional recruitment consultants, and the benchmark of ten vacancies per recruitment consultant should be the norm, as compared to the average of nineteen. It was agreed that the Fourth and Fifth Applicants had a workload of thirty-five to forty vacancies a month.

COMPETENCY AND TRAINING

[76] Mr Alexander who had drawn up a performance matrix agreed that all of the individual Applicants were competent in every area in which they were required to deliver services. It was further conceded by Mr Alexander that the training courses for Employment Services staff members was designed to increase the skills and competency in the jobs that they were performing at the time. It was further common cause that after February 1998, and after the business case was drawn up, none of the individual Applicants were sent on training.

[76] The evidence further indicated that all of the individual Applicants during their performance appraisal were rated as "very good" or

"*competent*". The performance appraisals were conducted during May 1997 and under the management period of Mr Alexander. Some of the incumbents who were subsequently reappointed on the other hand, were rated as "*not yet competent*".

[76] It was not disputed by Ms Griffiths that the "*training costs*" envisaged in the business plan could have been used to train the team before the individual Applicants were dismissed.

[76] Ms Griffiths was unable to say whether certain competencies were not existent within the individual Applicants.

[76] It is important to note that the job content had not changed, however as Ms Griffiths stated "*the manner of performing was different in terms of the new structure*".

THE POSTPONEMENT ISSUE

[76] Before attempting to analyse the legal position as well as the facts, I need to dispense with the application for postponement that was made by Mr Oosthuizen acting on behalf of the Respondent.

a. In terms of the Notice of Set Down served on the parties on the 11th of February 1999, the Registrar of this Court informed the parties that the trial has been enrolled for hearing on the 10th of August 1999. The Notice of Set Down draws the attention of the parties to ***inter alia*** the following :

"The Labour Court keeps a continuous roll. Parties are required to finalise the hearing within the period envisaged by them in the Pre-trial Minutes. A trial continues from the date of set down until it is complete and the parties and their representatives must be available to complete the trial."

[76] As a result of the learned Judge who was tasked with the trial having taken ill, this matter could not commence on the 10th of August 1999. The matter was then called on the 11th of August 1999.

[76] The parties were ***ad idem*** that the matter be set down for a period extending over five days.

[76] At the time that the application for a postponement was made, and after having heard Mr Oosthuizen as well as Mr Steenkamp the latter acting on behalf of the Applicants, I ordered that the application be denied and that my reasons would be set out at a later stage. My reasons in respect thereof follow.

[76] The principle reason for the application as I understood Mr Oosthuizen's argument was that if this matter was not concluded within the five day period, the legal representatives may have an availability problem. He further anticipated certain logistical difficulties. Mr Oosthuizen argued

that it would be preferable to finish in one sitting as the implications would impact directly on the records and the costs. Mr Steenkamp opposed the application and insisted that the matter must continue.

[76] The witnesses were all prepared, and there was no other reason that Mr Oosthuizen could furnish in addition to those already stated above.

[76] In an application for postponement, the legal principles established in the High Court over the years apply equally in practice in the Labour Courts. For the purpose of the present application, the following principles apply :

a. The trial Judge has a discretion as to whether an application for postponement should be granted or refused.

(R v Zackey 1945 AD 505;

Myburgh Transport v Botha t/a SA Truck Bodies 1991 (3) SA 310 NMSC)

e. That discretion must at all times be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons.

(R v Zackey supra;

Myburgh Transport supra;

Joshua v Joshua 1961 (1) SA 455 (GW) at 457D)

e. The trial Judge must reach a decision after properly directing his/her attention to all relevant facts and principles.

(Prinsloo v Saaiman 1984 (2) SA 56 (O);

Johannesburg Stock Exchange and Another v Witwatersrand Nigel Limited and Another 1988 (3) SA 132 (A))

e. An application for postponement must be made timeously, as soon as the circumstances which might justify an application become known to the Applicant. However, in cases where fundamental fairness and justice justify a postponement, the Court may in an appropriate case allow such an application for postponement, even though the application was not timeously made.

(Myburgh Transport supra;

Greyvenstein v Neethling 1952 (1) SA 463 (C)).

e. The application for postponement must always be ***bona fide*** and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the Applicant is not legitimately entitled.

e. "*Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a Court will be exercised.*" What the Court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the Applicant for a postponement can fairly be compensated by an appropriate order of costs or

any other ancillary mechanisms.

(Herbstein and Van Winsen, *The Civil Practice of Superior Court in South Africa*, 3 ed. at 453; *Myburgh Transport supra*)

e. *"The Court should weigh the prejudice which will be caused to the Respondent in such an application if the postponement is granted against the prejudice which will be caused to the Applicant if it is not."*

e. Where the Applicant for a postponement has not made the application timeously, or is otherwise to blame with respect to the procedure which the Applicant has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the Court in its discretion might allow the postponement but direct the Applicant in a suitable case to pay the wasted costs of the Respondent occasioned to such a Respondent on a scale of attorney and client. Such an applicant might even be directed to pay the costs of the adversary before the Applicant is allowed to proceed with the action or defence in the action, as the case may be.

(*Van Dyk v Conradie and Another* 1963 (2) SA 413 (C);

***Tarry and Company Limited v Matatiele Municipality* 1965 (3) SA 131 E;**

***Myburgh Transport supra*)**

[76] In the present matter, the application for postponement was to meet the availability difficulty that counsel may have experienced, together with the "*logistical difficulty*". I was not satisfied that these factors were in any way sufficiently compelling or warranted a postponement of the matter. In circumstances such as the present one, the parties as well as the legal representatives must be prepared to attend to their duties until the matter has been completed. The logistical difficulty alluded to, would have been on the part of the Registrar of this Court. The Registrar would have been terribly inconvenienced and this matter could only have been set down some time towards the beginning of the new millennium were I to have favourably ruled with regard to the application for postponement.

[76] It was for the reasons aforesaid that the application for postponement was denied.

[76] I now turn to the discussion of the merits with particular regard to the evidence as I have set out hereinbefore.

THE CONCEPT OF OPERATIONAL REQUIREMENTS

[76] Section 189 of the Labour Relations Act, Act 66 of 1995 as amended (the Act) sets out a number of substantive provisions applicable to a dismissal for a reason that is based on the employer's operational requirements. The term "*operational requirements*" is defined in Section 213 of the Act as meaning :

"Requirements based on the economic, technological, structural or similar needs of an employer."

[76] It is axiomatic that the Act requires a company to consult with its employees or their union before a final decision is taken with regard to the employee's dismissal for reasons based on the employer's operational requirements.

(Johnson & Johnson (Pty) Limited v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC); SA Clothing and Textile Workers Union and Others v Discreto - A division of Trump and Springbok Holdings (1998) 19 ILJ 1451 (LAC); Section 189 of the Act.)

[76] Clive Thompson in a leading article entitled *"Bargaining, Business Restructuring and The Operational Requirements Dismissal"* (1999) Vol. 20, ILJ states as follows :

"When labour and management go into dispute over business restructuring (at the end of whatever kind of process), on the other hand, dismissal may unfold from the very logic of the exercise. But at the stage an employer seriously contemplates dismissal for operational requirements, the interaction moves from the domain of bargaining or consultation to adjudication, from interests (power) to rights (law). And whether the dismissal can stand depends again on whether fair grounds arising from business needs can be demonstrated." (Emphasis added).

[76] It is not the function of this Court to decide ultimately whether the decision made by the employer is the correct one or whether this Court in fact agrees with that decision. This point was emphasised by Froneman, DJP in **SACTWU and Others v Discreto supra at 1230G** where the following was said :

"For the employee fairness is found in the requirement of consultation prior to a final decision on retrenchment. This requirement is essentially a formal or procedural one, but, as is the case in most requirements of this nature, it has a substantive purpose. That purpose is to ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements, or put another way, by a commercial or business rationale. The function of the Court in scrutinising the consultation process is not to second guess the commercial or business efficacy of the employer's ultimate decision (an issue on which it is, generally not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which Courts are called upon to do in different settings, every day). The manner in which the Court judges the latter issue is to enquire whether the legal requirements for a proper consultation process have been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process. It is important to note that when determining the rationality of the employer's ultimate decision on retrenchment, it is not

the Court's function to decide whether it was the best decision under the circumstances, but only whether it was a rational, commercial or operational decision, properly taking into account what emerged during the consultation process."

[76] In cases such as the present one, it is the substantive and not the procedural fairness that has to be the ultimate arbiter. Where an employer contemplates restructuring, that would have the effect in the form of changes to working conditions, the employer generally believes that the business survival is dependant on a change to work conditions or practices and procedures. Here there is no immediate attendant need or requirement to retrench. However, a consequence of such an action would be that the employees and their representatives will vigorously oppose such changes to the working conditions. The views expressed by Ngcobo AJP in **Imperial Transport Services (Pty) Limited v Stirling supra (1999) at paragraph 22 and 23** are apposite :

*"The question which arises in this appeal is when does the duty to consult arise where termination of employment is brought about by the deliberate conduct of the employer, such as restructuring of the business or introduction of changes in its operation. It seems to me in such a case, the duty arises when the employer, having foreseen the need for it, contemplates changes which might affect the job positions of certain employees. When an employer contemplates changes in its business, fairness dictates that the employer should, before implementing those changes, ask the question "Are there any job positions which might be affected by the contemplated change?" If there are job positions which might be affected by the contemplated changes, the employees whose jobs might be affected are, as a matter of fairness, entitled to be consulted before such changes are implemented. The need to consult before changes are implemented is obvious. Consultation provides an opportunity, **inter alia**, to explain the reasons for the proposed changes, to hear representations on possible ways and means of avoiding the loss of jobs or minimising the effects of the changes and to discuss and consider alternatives. Any representations made after the implementation of changes are more likely to be met with the natural reaction to justify the changes (**SACTWU v Discreto**) (**supra**)".*

[76] Clive Thompson in his article "Operational Requirements Dismissal" **supra at page 765** continues :

"Even if the employer is convinced that operational requirements will eventually necessitate the adoption of a particular set of employment terms and conditions, the change process should begin with negotiation (or consultation). The imperative to dismiss will only arise if bargaining or consultation fails, and not before. If it does fail, and if the employer can show that factors outside its control warrant a particular change, a case for an operational requirements dismissal can be made. Whether dismissal is ultimately justified depends on a judicial investigation of the underlying

business needs, and a policy lying call."

[76] With respect, I agree with the sentiments expressed by the learned author.

[76] For the purposes of Section 188(1)(a)(ii), a dismissal based on the operational requirements of the employer may pass the legislative muster by the production of a defensible plan of business restructuring. In cases where the dismissals are effected only to improve the employer's end of the bargain, then this cannot be allowed. This would in effect be a matter that is contemplated under Section 187(1)(c) of the Act. The Act simply does not allow the employer to dismiss individuals for operational reasons in order to entitle the employer to "boost" the employer's financial position - the employer has to show something qualitatively more : i.e. the operational necessity.

(See : Thompson at page 767)

[76] In cases such as the present matter, the employer's motivation must be neither sporadic nor superficial. It is a process that the employer has to embark upon in a diligent and conscientious fashion. The employer must then explore ways of adjusting, coping and mitigating through an information sharing and problem solving process.

(See : Item 12(3) of the Code of Good Practice : Dismissal, which deals specifically with operational requirements dismissal :

"The purpose of consultation is to permit the parties, in the form of a joint problem-solving exercise, to strive for consensus if that is possible.")

This would include an onus on the employer to show that the dismissal was attributed mainly to the fact that the employer's requirement for employees to carry out work of a particular kind has ceased or diminished.

APPLICATION OF THE LEGAL PRINCIPLES

[76] The fundamental difficulties that were being experienced in the Employment Services Division can be summarised as follows :

a. The receipt of negative feedback regarding the services that the division provided;

e. Dissatisfaction expressed by the IT community in a forum where the inability of Employment Services to provide value added service was expressed;

e. The inadequate skills level and qualifications of several of the recruitment consultants, and their capability to deliver;

e. The inability of the recruitment consultants to analyse positions and discuss potential applicants with their clients;

e. A lack of proactive recruitment initiatives.

[76] The above deficiency was summarised in the proposed restructuring document as follows :

"In essence, the clients are requesting a sophisticated, professional service provided by suitable qualified individuals, that is in support of their business strategies, and which provides the expertise that they do not have. The Employment Services Department also need to focus on what service it is here to provide, and not get distracted by the peripheral non-recruitment issues, such as the pre-employment medical testing and processing of appointments that it has been currently involved in."

[76] The evidence indicated that the restructuring exercise was not directed as a cost cutting exercise but rather a way of upgrading the level of service that this division had to offer. In other words the procedure that was being adopted had to be considered and changed. In my view, the Respondent attempted to disguise a classic retrenchment exercise as reorganisation or restructuring based on the non-delivery of services in this division. The business strategy adopted by the Respondent in order to achieve the desired effect, did not have the ring of a commercial rationale. It is correct that the dismissal of the individual Applicants was not actuated by malice, or some hidden motive, on the part of Respondent's management. However the fundamental job content did not change, it was the manner in which the individuals began performing that was now different. Here, the ultimate decision arrived at by the Respondent is neither commercially, nor operationally justifiable, on rational grounds based on fairness.

[76] The concerns of line management, coupled with the other difficulties alluded to in the evidence e.g. the negative feedback from clients, complaints being voiced at senior levels of management, was not discussed with the employees in the division at any of the Friday meetings prior to the 13th of February 1998. In fact, the Human Resources operational strategy annual report and business plan for 1998, which covers the activities during the period 1997 potrays a very different picture of the situation prevalent at the material time within the Employment Services Division. In terms of this report that was settled by the manager of the Human Resources Department, it is stated that :

"Client Satisfaction -

Area rated most poorly in satisfaction survey in March 1997. Many complaints from clients. Since new manager appointed virtually no complaints received. Clients who refused to use the area have been won back and others who did not use. Two of staff have recently been given

special awards by client areas. Area grew from twelve to cope with work demands. Went way over budget but very competitive against market rate."

[76] This report was finalised and circulated on the 15th of September 1997. The performance evaluation forms do not add value to the argument that the Employment Services Division was under performing in all respects. Mr Alexander further testified that there was an incremental improvement in the performance of the division immediately prior to his departure during or about October 1997. Mr West the manager of the Human Resources also corroborated the improvement in the delivery of the services immediately prior to the time that the decision to restructure was taken.

[76] Mr Oosthuizen referred me to the cases of **Imperial Transport Services (Pty) Limited v Stirling supra; SA Chemical Workers Union v Afrox Limited (1998) 19 ILJ 62 (LC); SA Commercial Catering and Allied Workers Union and Others v Pep Stores (1998) 19 ILJ 1226 (LC);** and **Van Rensburg v Austen Safe Company (1998) 1 BLLR 86 (LC).**

[76] I have considered these cases and in my view they are different from the facts in the present matter. In the above cases, it was the fairness of the redundancy that was being determined. In the present matter, as I understood the argument of Mr Steenkamp, it was the categorisation of the employer's actions in the form of a restructuring exercise that was being questioned. I have already alluded to earlier in this judgment the apparent "*differences*" between the old and new structures. In my view these do not consist of any real differences ***per se***.

[76] The differences in the old and new structure, amounted to a different way of delivering to clients, and not a change in the job content. Immediately before the 13th of February 1999, there was not an iota of suspicion within the individual Applicants that a process of restructuring was being contemplated by the Respondent. Even if I were to be incorrect in my analysis of the business decision of the Respondent, in my view the consultative process engaged by the Respondent does not meet the muster as envisaged in Section 189 of the Act. The manner in which Ms Griffiths went about in collecting the information with regard to the division can be described as questionable. With this as a starting point, it would be very difficult to attempt to reach consensus on the objects listed in Section 189(2) of the Act. There were no "*fair grounds arising from the business needs*" that could be demonstrated. Again, the Respondent failed to show that the particular 'change' was warranted: the change process did not begin with consultation either.

[76] In all of the above circumstances, I determine that the dismissal was not effected for a fair reason.

THE PROCEDURE FOLLOWED

[76] A meeting was convened on the 13th of February 1998, at which the restructuring proposal was conveyed to the affected employees. Here, it was suggested that certain alternatives be advanced by the individual Applicants. However there was some disagreement with regard to the time constraints advanced by the Respondent.

[76] Thereafter, and at subsequent meetings, Ms Griffiths went to some length to encourage all the employees in the division to participate in the assessment exercises and the subsequent interviewing processes. She also held individual meetings with the individual Applicants in order to try to persuade them to participate in the assessment interviews.

[76] It is of significance that each of the employees who participated in the process was in fact placed within the organisation subsequently. It is possible that if the Applicants had similarly participated in the process, they would in all probability have found a position within the department.

[76] The individual Applicants were also given the option of indicating whether they wished to be redeployed elsewhere within the Respondent. There is no doubt in my mind that the individual Applicants understood the concept of redeployment. At this stage, there were acrimonious correspondences that were being exchanged between IBSA and the Respondent. This in fact does not detract from the fact that the Respondent had after the 13th of February 1998 attempted to accommodate the individual Applicants in the envisaged process. The reason set out by IBSA for not recognising the substantive fairness of the exercise was that *"the procedures followed were fatally flawed in that the relevant sections of the Labour Relations Act were not complied with."* IBSA further stated in a letter dated 9th April 1998 :

"The purported retrenchments were effected in bad faith and represented an attempt to evade the provisions of the Labour Relations Act 66 of 1995 which set out the procedures and guidelines to be followed by the employers seeking to dismiss for poor work performance."

[76] Mr Oosthuizen argued that on a procedural level, the refusal of the individual Applicants to participate in the process precludes them from raising complaints, at a later stage, to the fairness of the procedure followed. I cannot find fault with this contention. However the process does not undo the damage caused, that I have alluded to earlier in this judgment with regard to the substantive fairness of the dismissal.

[76] In the circumstances, I am unable to find fault with the procedure adopted by the Respondent and accordingly determine that the procedure adopted by the Respondent was fair in the circumstances.

RELIEF

[76] The individual Applicants do not seek reinstatement or re-employment in this matter. I was informed by Mr Steenkamp that the individual Applicants would seek compensation.

[76] In terms of Section 194(2) of the Act :

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

[76] In the light of the present circumstances, I believe that it would be just and equitable to award each of the individual Applicants an amount equivalent to twelve month's remuneration calculated at their rate of remuneration on the date of dismissal.

[76] Mr Steenkamp argued that the Respondent must be ordered to pay the costs in this matter whereas Mr Oosthuizen submitted that he would leave this particular aspect to my discretion. In terms of Section 162 of the Act, *"the Labour Court may make an order for the payment of costs, according to the requirements of law and fairness."* In this particular matter, I see no reason why the costs should not follow the suite.

[76] In all of the above circumstances, I make the following order :

ORDER

[1] The dismissal of the individual Applicants was not effected for a fair reason.

[4] The dismissal of the individual Applicants was in accordance with a fair procedure.

[4] Respondent is ordered to pay the individual Applicants within 14 (fourteen) days of the date of this judgment the equivalent of 12 (twelve) months remuneration calculated on the basis of the individual Applicants' earning at the earning at their dismissal.

[4] The Respondent is ordered to pay the Applicant's costs.

JAJBHAY AJ
ACTING JUDGE OF THE LABOUR COURT

DATES OF HEARING	:	11, 12, 13 and
17th August 1999		
ON BEHALF OF APPLICANT :	Mr Steenkamp:	Cheadle Thompson
Haysom Incorporated		
ON BEHALF OF RESPONDENTS	:	Advocate A Oosthuizen
Instructed by	:	Findlay and Tait
DATE OF JUDGMENT	:	27 th day of August 1999