IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. JS371/03

In the matter between:

ERIC VAN DER VELDE Applicant

and

BUSINESS & DESIGN SOFTWARE (PTY) LIMITED First Respondent

NATIONAL GOLF NETWORK (PTY) LTD Second Respondent

JUDGMENT

A VAN NIEKERK AJ:

1.

2. Introduction

2.1. The principal issue in dispute in this matter is whether the applicant was dismissed for a reason that is listed as automatically unfair in section 187(1)(g) of the LRA (a dismissal that has as its reason the transfer of a business in terms of section 197 or a reason related to a transfer) alternatively, whether he was dismissed for a reason related to his employer's operational requirements. These are

mutually exclusive concepts: if the reason for dismissal is listed in section 187(1), the dismissal is automatically unfair, and there is no enquiry into substantive or procedural fairness. All that remains is for the Court to determine an appropriate remedy. If the reason for dismissal is found to be a reason other than one of those listed in section 187(1), then the enquiry moves to a consideration of the fairness of the substantive reason for the dismissal proffered by the employer, and whether the dismissal was effected in accordance with a fair procedure.

2.2. Also in dispute in this matter, assuming that the Court finds that the reason for dismissal is one that relates to operational requirements, is the applicant's entitlement to payment of a severance package in terms of section 41 of the Basic Conditions of Employment Act, 75 of 1997.

Both respondents oppose this action on the basis that the reason for the applicant's dismissal is not a transfer or a reason related to a transfer as contemplated in section 187(1)(g) of the LRA. The transfer of the business in question was one effected between the first and the second respondents. They contend that the applicant was dismissed because his position had become redundant, and because he unreasonably refused to accept an alternative position that was offered to him. They also contend that the dismissal was effected for a fair reason and in accordance with a fair procedure, and that because the applicant unreasonably refused an offer of alternative employment, he forfeited any right he might otherwise have had to

payment of a severance package.

The Court is therefore required to determine the following:

- whether the reason for the applicant's dismissal was the transfer or is a reason related to the transfer of a business as a going concern from the first respondent ("BDS") to the second respondent ("NGN") ("*the first issue*");

- if not, whether the applicant was retrenched and whether the retrenchment was effected in accordance with a fair procedure and for a fair reason ("*the second issue*"); and

- whether the applicant is entitled to a severance package ("*the third issue).*

The facts

There are no fundamental disputes of fact. The applicant was employed by BDS in March 1999 as the general manager and managing director designate. At that stage, a Nico Spence owned the business, which was subsequently acquired by the AST Group. Spence resigned from the business in April 2001. The applicant testified that the board subsequently made a decision to appoint him as Spence's successor. For reasons that were not fully canvassed, the applicant was never appointed, and a decision was taken in mid-2002 to appoint Paul Smulders as the managing director. The applicant

continued in his position as general manager.

In or about September 2002, Smulders advised the applicant that there was a concern within the AST Group that the management structure of BDS was 'top heavy', and that he was 'surplus to requirements.' Nothing more came of this intimation. In January 2003, the applicant established that AST wished to dispose of BDS, and that a consortium led by Smulders had proposed a management buy-out of the company. The applicant requested the right to submit a bid for the business on behalf of a consortium, which he did. During February 2003, the AST Group announced that the consortium led by Smulders was the successful bidder. Smulders testified that after the announcement, he met with the applicant and agreed to a “cooling-off” period to allow the applicant to come to terms with the fact that he had lost his bid for the business. The applicant subsequently made an offer, with other members of staff, to take over what was referred to as the “back office” part of the business, in the form of licence distributorship and software support. The offer was rejected, and the majority of the office staff engaged in these functions then resigned. There was some concern on the part of the respondents that the applicant had been instrumental in orchestrating the resignations.

By the end of February 2003, Paul Smulders had brought his brother, Marcel Smulders, into the business. This appointment obviously raised the issue of the applicant’s role in the business. At a meeting held on 3 March 2003, Marcel Smulders advised the applicant that he had three options- he could resign from BDS and possibly be offered the business systems division, he could stay at BDS and face disciplinary action, or he could be retrenched.

Subsequent to the meeting, the applicant addressed a without prejudice letter to Paul Smulders and the AST Group in which he proposed that he be retrenched on certain terms.

On 7 March 2003, BDS addressed a letter to the applicant, signed by Paul Smulders, offering him alternative employment by BDS as its administration manager, at a reduced salary, and “to report into and assist the various line managers”. The letter further advised him to limit his discussions with staff members who had resigned and to "ensure that all your client responsibilities are handed over to me immediately". Finally, the letter concluded by stating that it served as a formal warning "that failure to rectify the situation will force management to review your position in BDS".

On 11 March 2003, the applicant received an email from Steve Strydom, AST's head of human resources, in response to his proposal on the terms on which he would be willing to agree to a retrenchment. Strydom declined the applicant's request for a voluntary severance package. He noted that “*skills you have and the role that you currently perform makes you a valuable employee to AST, BDS and therefore I do not envisage that you will be considered for voluntary retrenchment. Voluntary retrenchment is a management decision."*

The applicant testified that Strydom's email left him bemused- on the one hand he was being asked to accept the lower position of BDS’s administration manager; on the other hand, he was being told that in his current position as general manager, he was a 'valuable employee' to AST and BDS.

On 17 March 2003, the applicant was moved from his office into the general work area. Marcel Smulders occupied what had been the applicant's office.

On 26 March, a meeting was held between the applicant, Strydom and the Smulders brothers. The applicant was told that the business was being restructured, and that the position of general manager was no longer going to be available from 1 April 2003. The applicant was also told that if he did not accept the position of administration manager, he would be retrenched.

On Friday 28 March 2003, a further meeting was held, with a labour consultant present, at which the applicant was again advised that if he did not accept the offered position, he would be retrenched. The applicant replied that he was not willing to accept the position. His reasons were that the remuneration on offer was inadequate, he was reporting to persons who had previously reported to him, and the position was not one in which he felt that he could fully utilise his skills. The applicant was then advised that he would be retrenched, and that he should collect his pay slip on Monday 31 March 2003.

At this point, I should mention that the applicant states that he had no knowledge of the nature of the transaction concluded between BDS and NGN for the purchase of the business of the former by the latter. As far as he was concerned, he remained employed by BDS in the capacity of general manager until his dismissal on 28 March 2003.

On 3 April 2003, NGN signed an agreement in terms of which NGN acquired the business of BDS. The transaction was described as a 'friendly internal acquisition'.

The agreement provided for the sale of BDS as a going concern. There is no dispute that in these circumstances, the transaction is one that was subject to section 197 of the Labour Relations Act. The sale agreement acknowledges this much, and makes provision for the transfer, on the same terms and conditions of employment, of all BDS employees to NGN. Clause 16 of the agreement provides that the employees listed in the schedule would be '*employed by the purchaser* [NGN] *during the interim period in terms of section 197 of the Labour Relations Act 66 of 1995 upon the same terms and conditions including remuneration and other benefits as those upon which they were employed by the seller* [BDS] *immediately prior to the effective date."* The Applicant's name is recorded in the schedule.

The sale agreement records that the effective date of the transaction, notwithstanding the date on which the agreement was signed, is 1 January 2003. All risk and benefit attaching to the business was deemed to have passed to NGN on the effective date, and ownership was deemed to have passed to NGN on that date provided that the cash portion of the purchase price had been paid by the delivery date, the business day after the last of the suspensive conditions had been fulfilled.

The sale agreement was subject to certain suspensive conditions that were to be fulfilled by 4 April 2003. It is not disputed that all of the suspensive conditions were timeously fulfilled.

At the commencement of these proceedings, the parties requested the Court to make a ruling on the date on which any transfer of the business, for the purposes of section 197, had taken place. At issue was the contention by BDS that it should not have been cited in these proceedings, since the Applicant had been dismissed by NGN some three months after the effective date of the sale to NGN of the business in which he was employed.

The Court ruled that it was not bound by the effective date that the parties had elected to govern their contract (1 January 2003) and that the transfer of the business for the purposes of section 197 of the Labour Relations Act took place when the sale became unconditional in April 2003. It followed that when the Applicant was dismissed on 28 March, he was in the employ of BDS and that BDS dismissed him prior to the transfer to NGN.

This is consistent with the applicant's conception of events- all of the meetings with him during March 2003 had been conducted with AST Group and BDS management present, the correspondence addressed to him was on an BDS letterhead, and nothing had been done or said to indicate that the identity of his employer had been affected by events since the announcement of the successful bidder for the business of BDS or, put another way, that he had become employed by NGN with effect from 1 January or any other date. The

respondents' positions were more ambivalent - Paul Smulders gave evidence to the effect that he and his brother had effectively assumed control of the business during February, but he conceded that at that time, NGN had not yet been established, that the conditional terms of the agreement had not been fulfilled, that the BDS bank account continued to be used by the business, and that during February and March 2003, matters were at an interim and transitional stage.

The first issue: Was the Applicant's dismissal related to the transfer?

2.3. Mr Bleazard, who appeared for the applicant, submitted that the applicant's termination of employment was a direct contravention of section 197 and that it constituted an automatically unfair dismissal in terms of section 187(1)(g) of the LRA.

2.4. The test to be applied in determining whether a dismissal is effected for a reason that is automatically unfair was recently the subject of some debate in the Labour Appeal Court. In *Kroukam v SA Airlink (Pty) Limited* (2005) 266 *ILJ* 2153 (LAC), in dealing with a claim that the reason for an employee's dismissal was his involvement in trade union activities and therefore automatically unfair, the Court adopted

divergent approaches before unanimously concluding that the dismissal was automatically unfair. Zondo JP, in considering this issue, held the following:

"*[102] Having regard to the reason(s) that I have found to have been the dominant or principal reason(s) for the appellant's dismissal and the provisions of the Act that I have referred to above which I have found the respondent to have breached in dismissing the appellant, I am satisfied that the appellant's dismissal was automatically unfair. In my judgment, there was ample evidence upon which the court a quo could and should have found the appellant's dismissal to have been dominantly or principally for prohibited reasons that rendered the dismissal automatically unfair.*

[103] However, even if the reasons that I have found to constitute the dominant or principal reason or reasons for the dismissal did not constitute the principal or dominant reasons for the appellant's dismissal, I would still find that the dismissal was automatically unfair if such reasons nevertheless played a significant role in the decision to dismiss the appellant. In my view for policy considerations, where such reasons have influenced the decision to dismiss to a significant degree, the dismissal should be dealt with as an automatically unfair dismissal in order to

deter as many employers as possible from entertaining such illegitimate matters as, for example, racism and the exercise of rights conferred by the Act as factors in their decisions to dismiss employees." (at 2188 B - G)

This approach would seem to require that the Court first determine the dominant or principal reason for the dismissal, and if that reason falls within the ambit of those reasons categorised by the Act as automatically unfair, to find that the dismissal is automatically unfair. Even if an automatically unfair reason did not constitute the principal or dominant reason for dismissal and in this sense constituted an ancillary reason, the dismissal is unfair if an automatically unfair reason influenced the employer's decision to dismiss to a 'significant degree'.

Davis AJA, in considering the same issue, held the following:

"*[26] Mr Snyman placed considerable emphasis upon the judgment of this court in SA Chemical Workers Union and Others v Afrox Ltd (1999) 20 ILJ 1718 (LAC) at para 32 where Froneman DJP set out an approach in respect of an enquiry relating to an automatically unfair dismissal in terms of s 187(1)(a) of the Act as follows:*

'The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation, applied

in other fields of law should not also be utilized here (compare S v Mokgethi and Others 1990 (1) SA 32 (A) at 39D - 41A; Minister of Police v Skosana 1977 (1) SA 31 (A) at 34). The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the 'main' or 'dominant', or 'approximate' , or 'most likely' cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare S v Mokgethi at 40). I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases. It is important to remember that at this stage the fairness of the dismissal is not yet an issue…. Only if this test of legal causation also shows that the most probable

cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of s 187(1)(a). If that probable inference cannot be drawn at this stage, the enquiry proceeds a step further.'

[27] The question in the present dispute concerned the application of this test. The starting-point of any enquiry is to be found in chapter VII of the Act. Thus, if an employee simply alleges an unfair dismissal, the employer must show that it was fair for a reason permitted by s 188. If the employee alleges that she was dismissed for a prohibited reason, for example pregnancy, then it would seem that the employee must, in addition to making the allegation, at least prove that the employer was aware that the employee was pregnant and that the dismissal was possibly based on this condition. Some guidance as to the nature of the evidence required is to be found in Maund v Penwith District Council [1984] ICR 143, where Lord Justice Griffith of the Court of Appeal held at 149 that:

'It is not for the employee to prove the reason for his dismissal, but merely to produce evidence sufficient to raise the issue or, to put it another way, that raises some doubt about the reason

for the dismissal. Once this evidential burden is discharged, the onus remains upon the employer to prove the reason for the dismissal.'

[28] In my view, s 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstances envisaged in s 187 for constituting an automatically unfair dismissal."

(at 2206 F - 2207 G)

Willis JA, delivering the third judgment in *Kroukam*, noted that Zondo JP and Davis AJA had, albeit by different routes, arrived at the same factual conclusion i.e. that the applicant in that matter had been dismissed primarily for reasons related to his union activities, and concurred in that conclusion on the facts without expressing a view on the approaches respectively adopted by Zondo JP and Davis AJA. In a memorable analogy, Willis JA suggests that whether one travels to Cape Town via the Garden Route or the Karoo, each journey will have its own charms. What matters in respect of factual issues is whether all concerned arrive at the same destination.

I do not think that there is any inherent conflict in the approaches adopted by Zondo JP and Davis AJA respectively. The starting point in any enquiry related to the true reason for dismissal in the context of the transfer of a business is section 187 itself. The relevant sub-section reads as follows:

> *"187.(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is …..*
>
> *g) a transfer, or a reason related to a transfer, contemplated in section 197 or section 197A; ….."*

It would seem to me that the authorities to which I have referred are consistent to the extent that an applicant in proceedings such as these, to bring the dispute within the ambit of section 187(1), must discharge an evidentiary burden to produce sufficient facts to establish that there is at least a credible possibility that the employer has effected an automatically unfair dismissal. When an applicant alleges that the reason for dismissal is a transfer or is related to a transfer in terms of section 197, it is incumbent I think on the applicant to establish at least the following -

1. The existence of a dismissal (see section 192(1);

2. That the transaction concerned is one that falls within the ambit of section 197 (i.e. the transfer of the whole or a part of a business as a going concern);

3. That there is some credible evidence to support the proposition that the dismissal and the transfer might be causally linked.

The last of these requirements might be established by showing what Prof. Darcy du Toit has referred to as the 'temporal coincidence of dismissal and transfer' (see Todd *et al Business Transfers in South Africa* Lexis Nexis, at 165). While a close proximity between the transfer of a business and a dismissal will not always establish a prima facie causal connection, I would venture to suggest that this is an important indicator and that in most cases, it will constitute credible evidence of causation. As Prof. du Toit points out, the underlying balance of fairness is not disturbed by adopting this approach, since it is always open to the employer to establish a fair reason for dismissal.

If an employee fails to discharge this evidentiary burden, that is the end of the matter, unless of course, the employee has been sufficiently prudent to rely on an alternative reason for dismissal that is not one listed in section 187(1) as the basis of the claim. In this event, section 192 (2) applies, and the employer must prove that any dismissal that is established is fair.

If the employee succeeds in discharging the evidentiary burden to which I have referred, then it is for the employer to show that the reason for dismissal is not the transfer itself or any reason related to the transfer, and that some other potentially fair reason was the true reason for the dismissal. The employer's motive for the dismissal is merely one factor to be considered; the enquiry is an objective one (see *Afrox* at 1726 E).

At this point, the tests of factual and legal causation become relevant. Assuming the test of factual causation (the ‘but for’ test referred to in *Afrox*) to

be satisfied, the enquiry is into legal causation, or put another way, whether the transfer or a reason related to it is the dominant, proximate or most likely cause of the dismissal. In *Kroukam's* case, it is in respect of this latter requirement (legal causation) that there appears to be a difference in approach, one that relates to the degree of dominance, proximity or likelihood that the automatically unfair reason was the reason for dismissal. On both approaches, it is clear that the automatically unfair reason need not be the sole reason for dismissal. On the approach adopted by Zondo JP, it would appear to be sufficient that the transfer or a reason related to it *significantly influenced* the employer's decision to dismiss. The test postulated by Davis AJA would appear to require more than 'significant influence', but happily, this is a matter that for reasons which will become apparent, I need not decide.

What complicates the application of section 187(1)(g) is the reference in that subsection to a 'reason related to a transfer'. As Prof. du Toit observes, this is clearly a broader concept than the transfer itself, and was no doubt included in subsection 187(1)(g) to prevent dismissals which offend against that provision even though passing the test of causality for the technical reason that the dominant cause of the dismissal, although inexplicably bound up with the transfer, was not the transfer itself (at p 167). Prof. du Toit uses the example of the factual situation in *Halgang Properties CC v Western Cape Workers Association* [2002] 10 BLLR (919 (LAC) to illustrate the point. In that case, the transferor employer dismissed two employees prior to a

transfer, on the basis of the transferee employer's operational requirements. In this instance, the reason for the dismissal was not the transfer itself (because there was no transfer at the time of dismissal) but for a reason directly related to it. Had section 187(1)(g) been in force when that matter was decided, Prof. du Toit suggests that the dismissals should have been regarded as automatically unfair.

> But it could not have been intended, he observes, that any connection between a transfer and a dismissal, however tenuous, should be enough to render the dismissal automatically unfair. Relatedness is primarily a matter of causation, but it is premised on the question whether the reason for the dismissal is sufficiently proximate to the transfer to bring it within the ambit of section 187(1)(g) (at p168).

But unlike cases such as *Kroukam*, where the dividing line in question was between the exercise of a trade union right and an act of misconduct, or *Afrox*, where it was a protected strike and a retrenchment, section 187(1)(g) does not make for a neat divide. As Prof. du Toit observes, where one employer absorbs or otherwise takes transfer of the business of another, redundancies frequently arise as a consequence. This is particularly so post-transfer, where the transferee employer may well be faced with two workforces, and where rationalisation is both necessary and inevitable. It would be absurd to suggest that any dismissal in these circumstances, whenever effected, would be automatically unfair simply because in some literal sense, it can be said that the dismissals would never have occurred but for the transfer, or because they were on some other basis transfer-dependent.

If, as the Constitutional Court has held, the purpose of section 197 is to balance employer and worker interests in the context of business transfers (see *NEHAWU and others v University of Cape town and others* 2003 (2) BCLR 154 (CC)), how then is a dismissal in the context of a business transfer to avoid inevitable classification as automatically unfair, or put another way, how is the necessary balance between employer and worker interests to be achieved in this context?

In his article "*Operational Requirements Dismissals and section 197 of the Labour Relations Act: Problems and Possibilities*" (2002) 23 *ILJ* 641, Craig Bosch argues that the clear purpose underlying the prohibition of transfer-related dismissals is to prevent employers from using dismissal as a means to avoid their obligations under section 197. If that purpose is not the basis for the dismissal, he suggests that it should be open to the employer to dismiss for operational requirements, provided of course that the employer complies with sections 188 and 189. I do not understand Bosch to suggest that this is a complete test. It may be, for example, that the transferor and transferee employers structure their transaction without any knowledge of or reference to section 197. The question whether there is any transgression of section 197 is therefore an objective one.

Prof. du Toit places this approach in the context of the two- stage test for factual and legal causation (Is the dismissal factually linked to the transfer? Is

the transfer the main reason for the dismissal?) and suggests that where the factual reason for dismissal lies in the employer's operational requirements rather than in the transfer or a reason related to the transfer, the dismissal is not automatically unfair (at p169). On this basis, the second question would fall away, and the enquiry would proceed to establish whether the requirements of section 189 had been met.

The two-stage test in the context of pre-dismissal transfers is also referred to by Prof. Nicola Smit in her article "*A Chronicle of Issues Raised in the Course of Dismissals"* (2005) 26 *ILJ* 1853. Professor Smit deals with the issue with reference to the European Directive (at page 1873) as follows:

> 2.4.1.
>
> 2.4.2. "*On the European continent and in the United Kingdom, as shown above, it is accepted that employees cannot effectively be dismissed by a transferor because of a transfer. The requirement of actual employment at the point of transfer is subject to the mandatory terms of article 4 of the Directive with regard to dismissals not being allowed in connection with transfers. Furthermore, most of the transfer instruments on the continent and in the United Kingdom provide that such a pre-transfer dismissal is automatically unfair, except where there is a defence relating to*

economic, technical or organizational reasons entailing changes in the workforce.

It is submitted that, of necessity, there must be a prohibition on dismissals because of a transfer. It would otherwise be a matter of choice for the transferor and transferee to comply with transfer provisions and to safeguard employees' rights in circumstances of this kind. However, it is also recognised that genuine operational requirements may necessitate dismissals prior to a transfer. If operational dismissals are to be allowed simultaneously or shortly before a transfer, it seems implicit that causality will play the crucial role in determining whether or not the dismissals are fair or not. The LAC followed a two-stage causality test for determining the fairness of dismissals of protected strikes in SACWU v Afrox Ltd. It is submitted that this test could also be suitable in determining whether a dismissal was in connection with, or because of a relevant transfer."

In summary, and in an attempt to crystallise these views and to formulate a test that properly balances employer and worker interests, the legal position when an applicant claims that a dismissal is automatically unfair because the reason for dismissal was a transfer in terms of section 197 or a reason related to it, is this:

- the applicant must prove the existence of a dismissal and establish that the underlying transaction is one that falls within the ambit of section 197;

- the applicant must adduce some credible evidence that shows that the dismissal is causally connected to the transfer. This is an objective enquiry, to be conducted by reference to all of the relevant facts and circumstances. The proximity of the dismissal to the date of the transfer is a relevant but not determinative factor in this preliminary enquiry;

- if the applicant succeeds in discharging these evidentiary burdens, the employer must establish the true reason for dismissal, being a reason that is not automatically unfair;

- when the employer relies on a fair reason related to its operational requirements (or indeed any other potentially fair reason) as the true reason for dismissal, the Court must apply the two-stage test of factual and legal causation to determine whether the true reason for dismissal was the transfer itself, or a reason related to the employer's operational requirements;

- the test for factual casuation is a 'but for' test- would the dismissal have taken place but for the transfer?

- if the test for factual causation is satisfied, the test for legal causation must be applied. Here, the Court must determine whether the transfer is the the

main, dominant, proximate or most likely cause of the dismissal. This is an objective enquiry. The employer's motive for the dismissal, and how long before or after the transfer the employee was dismissed, are relevant but not determinative factors.

- if the reason for dismissal was not the transfer itself (because, for example, it was a dismissal effected in anticipation of a transfer and in response to the requirements of a potential purchaser of the business) the true reason may nonetheless be a reason related to the transfer;

- to answer this question (whether the reason was related to the transfer) the Court must determine whether the dismissal was used by the employer as a means to avoid its obligations under section 197. (This is an objective test, which requires the Court to evaluate any evidence adduced by the employer that the true reason for dismissal is one related to its operational requirements, and where the employer's motive for the dismissal is only one of the factors that must be considered).

    - if in this sense the employer used the dismissal to avoid it section 197 obligations, then the dismissal was related to the transfer; and

    - if not, the reason for dismissal relates to the employer's operational requirements, and Court must apply section 188 read with section 189

to determine the fairness of the dismissal.

I have no doubt that in the present matter, the applicant clears the first hurdle with ease. There is no dispute that he was dismissed, or that the transaction in terms of which BDS was acquired fell within the ambit of section 197. In my view, the applicant adduced sufficient evidence to establish a possibility that his dismissal and the business transfer were causally linked, and in this regard, I need do no more than refer to the fact that the applicant was dismissed less than a week before the transaction that gave rise to the transfer was completed, and in the context of a factual matrix in which NGN was making the necessary preparations to assume full ownership and control of BDS.

It remains therefore for the respondents to establish that the true reason for the applicant's dismissal was a reason other than the transfer or a reason related to it.

The respondents contend that the true reason for the applicant's dismissal is a reason related to operational requirements. They contend that the applicant was dismissed not by virtue of the operational requirements of BDS, but because of the operational requirements of the consortium that had purchased the business of BDS. That was the case that the respondents set out in the pleadings, and it is the case upon which they presented their evidence and on which they sought to rely, despite a belated attempt to change the basis of their defence.

There are a number of reasons why, on the facts, BDS did not terminate the employment of the applicant on the grounds of its operational requirements. First and foremost, BDS did not seek to do so. In terms of the tender document, which BDS produced, it was required of the purchaser of the business of BDS that all of the employees of BDS would be transferred to NGN. This was included in the tender document and admitted by Smulders in his evidence.

Secondly, in consequence of the tender document and by virtue of the agreement that was concluded between the first and second respondents, the fact that all the employees were to be transferred became a binding contractual arrangement between the first and second respondents. The

applicant was included in that list of employees.

The only evidence (other than Smulder's evidence) that was presented by the respondents in respect of BDS's position on the matter is an email from Steve Strydom, the Divisional HR Manager Services of BDS, in response to a request that the applicant be paid a severance payment by way of a voluntary separation agreement. Strydom's e-mail, to which I referred above, is worth quoting in full. It reads as follows:

2.4.3.

2.4.4. "*Hi Eric*

With reference to our discussion on Friday afternoon I wish to reiterate as follows:

AST cannot accommodate your request for a severance package as it does not conform with the packages paid by the company to previously retrenched employees.

Furthermore the skills that you have and the role that you currently fulfill makes you a valuable employee to AST and BDS and therefore I do not envisage that you will be considered for voluntary retrenchment. Voluntary retrenchment is a management decision." [emphasis added]

2.4.5.

2.4.6. The email of Strydom is significantly dated 11 March 2003. Strydom was not called to give evidence on behalf of the respondents.

2.4.7. In terms of the agreement that was concluded, the purchaser (NGN) was to take over the employees who were listed in appendix 16.1 to that agreement "*upon the same terms and conditions including*

remuneration and other benefits as those upon which they were employed by the Seller immediately prior to the effective date ……..:.

The case of the respondents is, however, that it was unreasonable of the applicant to expect that he would continue to be employed on the same terms and conditions of employment not by virtue of the operational requirements of BDS, but by virtue of the acquisition of the business by NGN and its requirements.

2.4.8.

There are two further aspects that the respondents seek to rely upon. First, that BDS had no obligation to consult with the applicant in respect of any other matter other than the quantum of his severance package/an alternative position and secondly that it was disingenuous of the applicant to expect to be transferred across as the General Manager by virtue of the fact that he had rejected the position of Administration Manager, and for that reason, he could not argue that the termination of his employment was automatically unfair.

Smulders also gave evidence that it was not the intention of the respondents to retrench the applicant. In fact, it is the case of Smulders that it was the applicant's own doing that his services were terminated. The following was put to Smulders:

"*Despite that you terminate his employment on 28 March literally days before the agreement becomes unconditional",* to which Smulders replied *"We were given no choice in the matter on whether to terminate, that was Mr van der Velde's decision".*

It was also put to Smulders that:

"*There is nothing in writing Mr Smulders at all from then or any time until the end of March about any retrenchment or possible retrenchment of Mr van der Velde"*, to which he replied, *"We never envisaged the retrenchment of Mr van der Velde"*.

It was then put to Smulders *"You never envisaged the retrenchment of Mr van der Velde"* to which Smulders replied, *"We never wanted to retrench Mr van der Velde".*

Smulders himself acknowledged that the applicant was an integral part of the business and in fact was critical to the business. The following was put to Smulders:

2.4.9. "*Mr Strydom in fact says in his letter which he addresses to Mr van der Velde ….."* to which Mr Smulders replies *"Yes, in addition it was then*

with having lost all the key staff Mr van der Velde was probably the only one who knew exactly how the business had operated from the day to day operational and administrative procedures in terms of how the billing to the United States worked, and how the licensing issues and things like that worked. We had literally lost everyone else who could do that, so that was another reason why it was very difficult to accept losing Mr van der Velde on those terms".

On the respondents' own version that the applicant was regarded as a critical employee, and that as at 11 March 2003 he was regarded as being indispensable to the business and could not possibly be considered for retrenchment, less than three weeks later he was advised that unless he accepted an alternative (lower) position his services would be terminated summarily on 28 March 2003.

It was submitted by the respondents that the applicant was the author of his own misfortune in that his refusal to accept the alternative job on offer, was the true reason for his dismissal. This submission suffers from the false premise that the respondents were entitled to dismiss the applicant because he refused to accept the offer of alternative employment. The applicant was

under no obligation to accept the offer (which was clearly made on significantly less favourable terms than those on which he was employed) and the respondents were not entitled, as a matter of law, to dismiss him only on account of his refusal. BDS was also not entitled to deprive the applicant of a proper consideration of the impact of the pending transfer on his position, other alternatives that may have been available, and other matters on which consultation is required in terms of section 189. In effect, the applicant was presented with an ultimatum to accept alternative employment on less favourable terms or face the consequence of dismissal.

The question to be determined is whether the termination of employment of the applicant was effected by reason of the transfer or for a reason related to the transfer of the business from BDS to NGN.

2.5.

Would the applicant's employment have been terminated at the time had it not been for the transfer? Put another way, would the applicant have been dismissed on 28 March 2003 had it not been for the pending transfer? The facts in this matter are complicated by the nature of the transaction. The management 'buy-out' meant that between his successful bid for the business of BDS and the date on which he took formal transfer of it, Smulders was simultaneously wearing the hats of what section 197 refers to as the 'old' and 'new' employers. As the 'old' employer, he remained part of the AST Group and subject to its management, at least until April 2003. The applicant was dismissed prior to the formal transfer of the business from BDS to NGN, but in circumstances where Smulders was effectively acting for both but ultimately in the interests of NGN.

In my view, there is no evidence to suggest that the applicant's employment would have been terminated at the time were it not for the transfer. This is supported by the following:

- the evidence that despite the fact that Smulders had reported in 2002 that AST considered that the business "*top heavy"* it had run as such under his tenure;

- had the business of BDS remained under the auspices of the AST Group there is no evidence to suggest that the status quo would not have been retained or that Smulder's intimation of redundancy would have been pursued;

- even while the Smulders consortium had begun to assume control of the business, the applicant was told that he was a valuable employee and BDS wished to retain his services;

- Smulders himself stated that the applicant had skills and talents which were critical to the business;

- the issue of why in such circumstances the applicant was the only employee who was not transferred to NGN is not satisfactorily dealt with by the respondents; and

- the terms of the agreement between BDS and NGN provided for the transfer of the applicant from BDS to NGN on the same terms and

conditions.

Once it is accepted that the transfer was the factual cause of the applicant's dismissal, the next question is whether the transfer was the real or proximate cause of dismissal. I have no doubt that on a balance of probabilities, it was. While I accept that Paul Smulders' subjective intention may have been to terminate the employment of an employee whose job had been restructured and who had refused what he considered to be an offer of reasonable alternative employment, his motive is not the determining factor. The enquiry is an objective one, and must take into account all of the relevant facts and circumstances. In this instance, the 'new employer' (NGN) had begun to assume control of the business of which it was soon to take transfer. It had agreed with the 'old employer' (BDS) that it would take transfer of all of its employees, including the applicant (who was specifically named in a schedule to the agreement), and that they would enjoy continued employment on the same terms. Smulders must have been aware of these provisions- he was a party to the negotiations relating to the sale of the business and he was a signatory to the agreement itself. On the date that the applicant was dismissed the transfer was not only contemplated, it was virtually consummated. The probabilities are that Smulders was aware therefore that the applicant had a right to continued employment with NGN on the same terms, and that this right would become both publicly knowledge and effective during the first week in April when the agreement of sale was signed

and the suspensive conditions fulfilled. The applicant's continued employment on the same terms clearly did not meet Smulder's requirements for the business of which he was soon to take formal transfer. The only conclusion that can reasonably be reached is that the applicant was dismissed because of the transfer of the business of BDS to NGN.

Even if I am not correct in coming to this conclusion, at least in the sense that it might be suggested that the applicant's dismissal could not have been effected by reason of the transfer because he was dismissed prior to the date on which the business was formally transferred, I consider that for the above reasons, the applicant's dismissal was related to the transfer. In this regard, Smulders must have been aware of his obligation to take transfer of the applicant's employment contract on the same terms and conditions, and his conduct during the week preceding the transfer is such that objectively speaking, he sought to avoid this obligation by dismissing the applicant.

In summary, the respondents have failed to discharge the onus of establishing that the applicant was dismissed for a reason that was not the transfer of the business of BDS. The reason for dismissal proffered by the respondents (one related to operational requirements) fails to stand up to scrutiny. If the applicant was indeed redundant to NGN, and the intention was to replace him with one or more other employees, to have dismissed the applicant days prior to the transfer seems to me, in the absence of additional factors and on a balance of probabilities, an automatically unfair dismissal.

It follows that the applicant’s dismissal by BDS prior to the transfer of the business to NGN was automatically unfair. In view of that conclusion, it is not necessary for me to consider the second and third issues identified above.

2.6.

The applicant does not seek reinstatement. The maximum award of compensation to which he is entitled is the equivalent of 24 months' remuneration. After his dismissal, the applicant secured alternative employment. He provided details of his earnings which were not significantly less than the amounts he earned while employed by BDS. During the course of his evidence, the applicant stated that he had also been paid an amount of R5 000 per month by way of expenses. It appears that this amount was paid on the basis that if expenses were not submitted to its full value, the amount would “roll over to the next month”. I do not consider this to be part of the applicant’s remuneration and it is not to be brought into account in the calculation of the compensation that I have ordered. I have also taken into account that the purpose of section 187(1) is to protect fundamental employee rights, and that any dismissal for an automatically unfair reason is by definition a serious breach of those rights.

I am satisfied that compensation in an amount equivalent to 12 months’ compensation to be calculated on the basis of the applicant’s total cost to company remuneration package but excluding the payment of any amount relating to reimbursable expenses, is equitable.

Section 197 provides that the transferee employer is liable for all of the employment-related obligations of the transferor, with the exception of criminal liability, and assumes this liability on the date of the transfer. Although the applicant was dismissed on 28 March 2003, the effect of the transaction that was finalised in April 2003 is that the second respondent assumed any liability on the part of the first respondent for any unfair dismissal committed by the first respondent. This is a consequence that occurs by operation of law. I intend therefore to make an order for the payment of compensation as against the second respondent.

I accordingly make the following order:

1. The applicant's dismissal was automatically unfair.

2. The second respondent is ordered to pay the applicant the equivalent of 12 months' remuneration.

3. The first and second respondents are to pay the costs of this action, jointly and severally, including the costs of those postponements when it was agreed and ordered that the question of costs was reserved.

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ANDRE VAN NIEKERK
Acting Judge of the Labour Court

Date of hearing :

Date of judgment: : 31 March 2006

Attorneys for Applicant : Mr Brian Bleazard

Counsel for Respondent : Advocate M Van As

Attorneys for Respondent : Snyman Van der Heever Heyns