

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case no.: JA31/99

In the matter between:

MALCOLM SAYLES

Appellant

and

TARTAN STEEL CC

Respondent

JUDGMENT

C

ONRADIE JA

- [1] The appellant was in the labour court before Mlambo J adjudged to have been unfairly dismissed. He was nevertheless awarded no compensation. The appeal is against that order. There is a cross appeal against the order that the appellant had been unfairly dismissed.
- [2] The appellant was employed by the respondent as the works manager of its slitting division. Without putting too fine a point on it, 'slitting' involves the processing of steel in a manner which makes it suitable for further processing by customers of the respondent. The respondent was a small business. There were at the time – September 1997 – only thirteen employees. One of them was the managing member, a Mr V. B. Gardner. The other was the son of the previous manager, Mr Douglas Ferguson. Together they managed what was referred to as the respondent's 'cash-and-carry division'. This was a retail outlet specialising in steel products. There was another department, the cutting division, which cut

steel to the sizes required by customers. Gardner, Ferguson and the appellant formed the management team of this modest enterprise with its three departments.

[3] The slitting division did not prosper. In fact, it fared so badly that Gardner began thinking of shutting it down. He said in evidence that the appellant was aware of the division's unsatisfactory performance. The parties were agreed on this although they differed on the nature of the malaise. On 29 July 1997 Gardner wrote one letter to the trade union representing the unionised employees and another to the Bargaining Council of the Iron Steel and Metallurgical Industry. In these letters he notified the bodies concerned of the intended closure of the slitting division and invited discussion with the union. Four employees were targeted for retrenchment. The group did not include the appellant who was the fifth employee in the slitting division. He was omitted from the group because it was not intended to dismiss him.

[4] Gardner said in evidence that on 24 July 1997 (a date which his diary allowed him to identify) he had a discussion with the appellant in the course of which he advised the latter of the proposed closure of his division but invited him to remain in the appellant's employ at the same remuneration in order to assist with the running of the cash-and-carry and cutting divisions. Gardner said that the business needed the appellant's expertise and, anyway, he considered that in view of the appellant's age and family commitments keeping him on would be the honourable thing to do. The appellant, he said, gratefully accepted the offer.

[5] The appellant's version was dramatically different. He testified that he first learnt of the impending closure of the slitting division during late August or the first week

of September 1997. He heard about it from the employees in his department who were to be retrenched. According to the appellant, the first communication in this regard from Gardner was on 4 September when he was called in just before the end of the day's work and in the course of a two minute conversation told that 'on 19 September the work force in the slitting division would finish but I would be okay, I could move over to the cash-and-carry side'. He was so shocked that he could think of nothing to say.

- [6] The day after the dismissals for operational reasons took effect on 18 September 1997, the appellant wrote to the respondent informing it that since it could not offer him a position commensurate with his skills and qualifications he had no alternative but to 'request retrenchment as has been carried out with the rest of the workforce on the slitting side.' He wished the respondent to put forward a severance package to be discussed on 26 September 1997. On 25 September 1997 Gardner wrote to say that since the appellant had been offered (and had accepted) another position with the respondent, he was not entitled to demand retrenchment. On the same day the appellant responded by reiterating that he was not obliged to accept the position offered to him. This letter was followed by a meeting the following day as the appellant had proposed. This led the appellant to put forward in a letter dated 29 September 1997 certain factors which he suggested should be taken into account in formulating a retrenchment package. The respondent's answer, which came a day later, was to suggest that the appellant either take up the alternative employment, or that he accept a retrenchment package, the details of which were set out in the letter. The appellant did not return to work after that. On 6 October 1997 the respondent wrote to him that unless he accepted the retrenchment package he should report for work immediately. In response the appellant the next day wrote to say

that he was prepared to accept neither the position offered to him nor the retrenchment package and that he was consulting his lawyer.

[7] It cannot be overlooked that the appellant nowhere in the correspondence expresses his dismay at not having been advised of the impending closure of the division which he controlled. There is also no evidence that the appellant took any steps to debate with Gardner what he must have believed was the loss of his job between the first week of September when he says he (at the latest) learnt of the closure and 18 September when the retrenchment of the other employees in that division took effect.

[8] In the light of these facts, it is probable that the appellant was informed of the pending retrenchments some days before the letters to the union and the bargaining council were written. It seems in the highest degree improbable that the appellant, as manager of the slitting division, would have been the last to be told that the division was to cease operations. There was no reason to withhold this intelligence from the appellant. There certainly was no hope of concealing it from him. He was on amicable terms with Gardner. He was *de facto* part of the management team in a closely knit small business. I would say that, on a balance of probabilities, the appellant was advised, as Gardner says he was, of the respondent's intention before that intention was communicated to the other employees. If this is so, it leads to the strong inference that Gardner's evidence that the appellant accepted the offer of a job in the cash-and-carry and cutting divisions was more reliable than that of the appellant which was that he had not. The only thing the appellant could have done if he had later regretted having taken the new job was to resign. It follows that the cross-appeal should succeed and that the appeal fails.

[9] The respondent's counsel, Mr Beaton, submitted that success on the cross-appeal should carry with it an award of costs in the court *a quo*. Although the result which Mlambo J reached was for practical purposes the same as that which has now been reached, he did hold that the appellant had been dismissed when his position was made redundant by the closure of the slitting divisions. It was conceded by the respondent's counsel at the pre-trial conference that, if there had been a dismissal of the respondent, it would have been unfair for lack of consultation. The concession was correct. Since the respondent was not considered to form part of the group of potential retrenchees, he was not consulted on any of the matters envisaged by s 189 of the Labour Relations Act 66 of 1995. The respondent's defence was that even if the appellant was found to have been dismissed, he would not be entitled to severance pay because he had failed to accept the respondent's offer of alternative employment. In the nature of things it was not quite the same work he had done before, but I am persuaded that it was close enough to it to have been an acceptable alternative. This is what Mlambo J held and I think, with respect, that he was quite right in this. The respondent, as a small enterprise, could offer nothing else.

[10] On the premise that the appellant had been unfairly dismissed, he was also quite correct in holding that although the appellant may have forfeited his right to severance pay, he still had a potential claim for compensation for the invasion of his right to a fair procedure (See *Johnson & Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR 1209 (LAC) p 1219 [40]). In the exercise of his discretion, he awarded no compensation

[11] The appellant was, therefore, left with the cold comfort of a declaration that

he had been procedurally unfairly dismissed. The respondent was not ordered to perform any obligation. The result was not a ringing success; but the small success which the appellant did achieve was sufficient, it seems, to have persuaded Mlambo J that he ought not to be ordered to pay costs. The conclusion of this court that the appellant should have lost on all counts means in my view that he should pay the costs also in that court. There is no employment relationship to be nurtured. The respondent behaved perfectly properly throughout. The harm which befell the appellant was entirely self-inflicted. It is not inequitable that he should pay the costs of a case which he could so easily have avoided.

The appeal is dismissed with costs.

The cross-appeal is upheld with costs.

The orders of the court *a quo* are set aside and replaced by an order reading 'the application is dismissed with costs to be taxed on scale B of table A of annexure 2 to the Magistrates' Courts Act 32 of 1944.'

CONRADIE JA

I agree

ZONDO AJP

I agree

MOGOENG AJA

Date of Hearing: 2 November 1999

Date of Judgment: 9 November 1999

Appellant's attorneys: Gillian Lieberman Katz

Appearance for Appellant: Adv. B Jackson

Respondent's attorneys: Yusuf Nagdee

Appearance for Respondent: Adv. R G Beaton