CASE NO D387/06

HEARD: 21-23 OCTOBER 2009

DELIVERED 4 NOVEMBER 2009

REPORTABLE

In the matter between

ROY SAUNDERS APPLICANT

and

WACO AFRICA LTD RESPONDENT

JUDGMENT 26 OCTOBER 2009

PILLAY D J The applicant employee claims reinstatement and compensation for unfair retrenchment. The respondent employer resists the claim, contending that it complied with its statutory duties, and further that it has no post available to reinstate the employee.

The employer engaged the employee in 1998. By 2001 the employee held the title of Divisional Director KwaZulu-Natal for the employer. He was not a director as contemplated in Company Law.

In August 2001 Dave Best, the Managing Director at the time, invited the employee to establish and manage its Africa Division. The employee accepted the invitation on the understanding that Best had agreed that if the venture did not succeed he would return to his old job as Divisional Director. Best could not recall giving such an undertaking and denied that he would have given it.

Initially, the Africa Division secured some lucrative contracts. Overall it ran at a loss. By November 2004 the management began contemplating its closure. In the financial year ending 2005 it had

accumulated a nett loss of R399 million.

By April 2005 the management decided that if the Africa Division did not secure a sizable contract in excess of R10 million, then the division should close or be incorporated into a branch. By October 2005 the prospect of securing large contracts remained remote.

As a final effort to ascertain the viability of the division, the employee and Brian Boyd, the Managing Director of SGB Cape South, an operating division of the employer, which incorporated KZN and the Africa Division, met potential contractors in the Middle East.

These meetings did not secure any certainty or contracts for the Africa Division. As the start dates for the two targeted projects that could have rescued the Africa Division were uncertain, the management decided to close the Africa Division.

On hindsight, the employee's assessment might have conduced to a better course of action, since the two targeted contracts materialised six and eight months after he was dismissed. His suggestion that the Africa Division should be incorporated into the other divisions might also, on hindsight, have proved to be more prudent since, after his dismissal, the employer did incorporate the Africa Division into the business.

However, when the management made these decisions it did not have the wisdom of hindsight. Acting as a collective, the management decided in good faith that they were in the best interests of the business. There is also no suggestion that the management had ulterior motives when it took these decisions.

The employee was a member of the management; as such, he had

full access to all relevant information and he participated in the decisions pertaining to all the divisions of the employer, including the Africa Division. Although he did not agree with the closure of the Africa Division he was part of a collective and he was bound by the decision.

On the facts available at the time, namely the increasing financial losses that the Africa Division sustained and the uncertainty of new contracts going forward, management decided to close down the Africa operations. That resulted in the positions of the employee and his secretary, the only two employees in the Africa Division, becoming redundant.

On 14 October 2005, before embarking on the trip to the Middle East in search of new contracts, Boyd had discussed options with the employee. Although the employee had minuted that the options discussed were his relocation or receiving a package, and Boyd had recorded in a letter that the options canvassed were redeployment or retrenchment, not much turns on the difference. Both formulations contemplated either some form employment or termination of employment.

On 28 October 2006 Boyd informed all the SGB South Cape employees that there was a need to reorganise the region in light of the business moving away from scaffolding only to include insulation and painting, to allow younger talent to move up in the ranks and hence create openings at all levels.

On 3 November 2005 the employee recorded the following to Boyd.

> "The decision to continue operating Waco Africa is yours. (*sic*) I have given you my input and I believe that it is viable. As far as my position is concerned I wish to add the retrenchment is not an option. I have longer service than

> most of my peers and in any case an undertaking was given which provides me with job security, details of which I do not propose to reiterated it in this letter.
>
> This leaves the only real option, if there is no future for me with SGB (and I do not believe that is the situation) namely that of an agreed separation accompanied by the payment of an agreed compensation for the loss of my job. I am now 58 yeas old and I have reached the stage in life when I am earning well and preparing for my retirement and you can surely understand that I'm not going to give it up." [1]

On 10 November 2005 Boyd discussed this letter with the employee and pointed out that the decision had been made to close the Africa Division. He informed the employee that he had investigated and found no alternative employment for him and that his dismissal would be an "operational retrenchment not subject to LIFO" (last in first out). The employee's option, he said, was to "receive legal allowance and contest" or to "negotiate an agreeable package."

Boyd presented a draft calculation of the employee's package for discussion. In settlement, he offered to pay severance pay at the rate of two weeks per year of service; otherwise, the policy of one week per year would apply.

The employee pointed out errors in the calculation of the notice and leave pay, and his years of service, which was, on his calculation, not 14 years but 18 years in his view. He rejected retrenchment as he believed

[1] page 38 of Bundle A

that he had an undertaking on job security. As he had six years left to retirement, he proposed that the employer meet him half way and pay him three years salary and he would leave. Boyd undertook to revert. They parted on the note that it was in the best interests of both parties to resolve the matter amicably.

On 21 November 2005 Boyd reaffirmed that the Africa Division would close. Regarding the employee's situation he wrote,

> "You state that retrenchment is not an option as you have longer service than your peers. As the whole branch is being closed for operational reasons the LIFO principle is not applicable. Both yourself and the company have been unable to identify a viable and suitable position for yourself in the company and unfortunately there is no other option but to notify you that your position will become redundant, and notice is hereby given that your employment with the company will terminate on 28 February 2006.
>
> As per the Basic Conditions of Employment Act the severance pay payable will be one weeks' remuneration for every completed year of service. Your concern over your starting date has been addressed and your service with Proscaff starting 1 March 1998 has been accepted. The severance pay applicable is 17 weeks, that is 3.93 months at R58 555 = R230 109.30 …..and excludes any leave pay due to you.
>
> However, you have indicated that there are other issues of job security arrangements that we are not aware of and in the spirit of recognition for your service, and in order

> to make this termination as pleasant as possible, we are prepared to make an agreed separation of a lump sum of R500 000 before tax, in full and final settlement. This includes all benefits and payments such as leave due and notice pay and only excludes any provident fund payments due. This package proposal would also include for a waiver of your restraint of trade agreement. (*sic*) Agreement on this proposal would be subject to agreeable signed documentation and your last working day would be 30 January 2006. November, December and January salary payments would be in addition to the above amount.
>
> If this is not appropriate, we reserve the right to apply the conditions stated in the Basic Conditions of Employment Act.
>
> As you are over 55 years of age, you are able to retire from the provident fund.
>
> Should a separate Africa scaffolding branch with a full time requirement for a separate regional manager be implemented within the next 12 months, you will be considered for the position. Your decision on the full and final settlement is required by latest 30 November 2005."

The employee engaged an attorney to demand that the employer withdraw this notice to dismiss. In response, the employer's attorney's made a concerted effort at curing deficiencies, if any, in the retrenchment procedure.

It invited the employee to suggest alternative positions to which he might be appointed, simultaneously clarifying that as the division was

closing, only the two employees were likely to be affected, thereby implying that the option of finding alternative positions was limited to vacant posts. As there were no vacant posts, finding an alternative was not an option.

A further consequence of the "proposed" method of selecting employees was that all employees in the division were likely to be affected.

The employer undertook to pay all statutory entitlements to severance, leave and notice pay. It refused to withdraw the dismissal letter and concluded with a further invitation to the employee to adduce any further aspect of the retrenchment for the employer's consideration.

On 8 December 2005 the employee's attorney persisted that the employer had not complied with sub-section 189(3) of the Labour Relations Act No. 66 of 1995 (the LRA), allegedly because it was attempting to consult after issuing the notice of dismissal. He contended that the retrenchment was a *fait accompli*.

In reply, the employer's attorney threatened that the employee acted to his peril by not taking up its invitation to make further proposals which might even cause it to amend its decision to retrench.

Unconvinced of the sincerity of the employer, the employee disputed the fairness of his retrenchment. Eventually, the dispute was ventilated at trial.

Submissions

Mr Malan for the employer, contended that the retrenchment was effectively fair. As the employee was a member of the management, he was

fully informed about the financial status of the business and all the considerations that conduced to the decision to close the Africa Division. The employer invited the employee repeatedly to make proposals to avoid or ameliorate the effects of the retrenchment. However, the employee persisted that Best had given him an undertaking that he could have his old job back if the Africa Division "didn't take off".

The employee made no proposals other than to ask for a package. As a result the consultation slipped into the mode of establishing whether there was an undertaking to give the employee his old job back.

As the employee came up with no alternative position, it was common cause that there were no positions available for him. Besides, the employee had previously indicated that he was not prepared to relocate to Johannesburg. He had also turned down the option of working with Peter Erasmus because they did not get along.

At the start of the trial, Mr Stewart, for the employee, withdrew the employee's claim, based on age discrimination in response to the employer's exception that the employee pleaded no facts to support his mere assertion that he had been discriminated.

The employee persisted that he had an undertaking that he would revert to his old job. To this end he called two witnesses who were present when Best allegedly gave the undertaking in 2001.

Was there an undertaking?

Eight years after the meeting at which the undertaking was allegedly

given, the memories of the witnesses had faded and their recollection is predictably unreliable. Best's stance that he could not recall giving the undertaking and his expatiation that he would not have given it, imports a measure of ambivalence. The manner in which he gave is evidence was also hesitant and tentative.

The employee testified that Best had used the words "*status quo*" when giving the undertaking. His witness, John Charles Page Warren, testified that it was common knowledge that the "*status quo*" would apply. According to Warren, when the employee had mentioned that he would return to his old job if the Africa Division did not work out, Best had remained silent. Michael Gormley testified that when the employee raised his concerns at the meeting, Best replied that he would continue working in Durban and that everything would remain the same. He recalled the words "*status quo*" being mentioned, but he could not say who used them.

The employer sought to discredit these witnesses because they allegedly had axes to grind with it. Mr Malan highlighted differences in the detail of their evidence as to exactly who said what during the meeting.

Given the passage of time and the nature of the issue they were called upon to testify, they can hardly be expected to recall word for word who said what. At best, they could recall the gist of what was said. Differences in how Warren and Gormley communicated the gist negate neither the probability that there was an undertaking nor the credibility of these witnesses. The Court found nothing in their testimony to suggest that they were untruthful. If they were disgruntled, it did not impair their credibility. Theirs was a genuine effort at assisting the Court to make a

decision.

Nevertheless, the Court exercised the caution in evaluating the evidence of Best, Warren and Gormley on this issue, because of their loss of memory over time. The employee, however, had made notes contemporaneously with his discussion with Boyd. At the meeting the employee had asked: "What will happen to me should the new venture not work?" He noted Best's reply as follows: "Status quo, I go back to my old position."[2]

Notwithstanding this exchange at the meeting in 2001, Best made his position explicit when he wrote to the employee on 17 January 2003 as follows:

> "1.2 Your reference to a "status quo" undertaking, which you have raised several times, and as I previously stated (including at our June/July meeting in Johannesburg) I have no recollection of saying this, however….
>
> 1.2.3 You obtained and carried out work successfully and profitably in several African countries so the possible "worst case scenario" fell away.
>
> 1.2.3 You also need to bear in mind it is completely unrealistic to expect the Company to give you an unequivocal undertaking that you would revert back to your previous position at Director KZN."[3]

In 2003 the Africa Division was successful and profitable; the "worst case scenario" had fallen away. Furthermore, in that letter, Best's support for

[2] Page A10 of Bundle A

[3] Page 12 of Bundle A

the Durban branch manager who replaced the employee is unmistakeable. Given this scenario in 2003, adhering to any "*status quo*" undertaking he gave in 2001 was not in the employer's best interests; reneging on the undertaking was also tenable because the venture was successful. However, by 2004 the "worst case scenario" reared its head and by 2005 it became a reality, along with the undertaking.

To Best's letter, the employee replied that he had "no doubt in (his) mind about the status quo undertaking" and reserved his rights. Later, with the disagreement about the undertaking hovering, Boyd called a meeting with the employee and Best to clarify whether Best had given the undertaking. As far as Best and Boyd were concerned, that meeting put the matter to rest on the basis that Best had given no undertaking. The employee disagreed.

The Court prefers the evidence of the employee and his witnesses over that of the employer's witnesses. The employee kept the best and most reliable record of the discussion with Best in 2001. Furthermore, establishing the Africa Division was Best's idea, not the employee's. Best had approached the employee to establish it. In so initiating the new venture the employer carried the risk. The employee could have refused the offer. If there was any suggestion that he shared the risk of the new venture the employee would have refused. He accepted the challenge without any change to his remuneration. His remuneration therefore did not reflect a new risk profile for his job security.

The Court is satisfied that the employer did give the employee an undertaking that he could return to his old job as Director KZN. Even if the

Court is wrong in pitching the 2001 discussions as high as amounting to an undertaking, there was at the very least an implicit commitment that the employee's job security was not at risk.

Procedural Fairness

Irrespective of whether the employer gave an undertaking or commitment to retain the employee in his old job, it had a statutory obligation to ensure that the retrenchment was procedurally and substantively fair.

For procedural fairness the notice to retrench in terms of section 189(3) is usually scrutinised. Sometimes the notice can be a façade for procedural compliance. At other times it is immaterial whether the notice was issued because the objective of the notice is achieved in other ways. In either instance the Court has to peruse the form of what was done to assess precisely what was actually done to seek consensus.

In this case it was immaterial whether the employer issued the notice in terms of section 189(3) at all. The employee was a management member and had full access to all relevant information for purposes of consulting. Such information that he did not have, the employer would have given. Besides, as a manager he would also have been aware of his entitlements under section 189(3).

That the employer's attorneys issued the notice after the employer decided to dismiss the employee therefore is of no moment. However, whether the section 189(3) notice was a paper trail to create a façade of compliance emerges from the following analysis:

Although the employee participated and was bound as a member of the collective to the management decision to close the Africa Division, he did not participate in the decision about what should happen to him. He was merely told what would happen to him. Because the division was closing he was told that only the employees in the division would be affected. He was told that LIFO would not apply because all the posts in the division became redundant. This much is self evident from the correspondence. On these issues fundamental to job security the employer stonewalled him, giving him, during the consultations, no reasons why only the employees in the division would be affected and why LIFO would not apply merely because all the posts in the division became redundant.

In court, however, the employer's witnesses testified that it had considered engaging the employee in his old job but had rejected the idea because the incumbent was doing a better job. The employee was an excellent salesman, they said, but he lacked management expertise.

Most importantly, however, the nature of the skills required for his old job had expanded beyond scaffolding to include insulation and painting. The incumbent had acquired these skills on the job over time. Although the employer conceded the employee could also acquire the skills, returning to this position would have been disruptive, they said.

If the employer had considered, but decided not to return the employee to his old job, then the employer canvassed none of these considerations with the employee during the consultation. For instance, the employee was not invited to say whether he had the new skills required. Even if they knew that he did not have the skills, they did not know how long

it would have taken him to acquire them. The employer assessed his competence as a manager without affording him an opportunity to comment on its negative assessment. Whether the succession plan to allow "younger talent to move up the ranks" apparent in 2006 influenced the decision taken in 2005 was not canvassed either during the consultations or in evidence at the trial.

The employee's stance had always been that he was entitled to his old job. For that reason alone the employer owed him a detailed explanation during the consultation about why it could not accede to his proposal. The employer is therefore not correct in contending that the employee made no counter proposals other than to ask for more money in the form of a larger settlement package. The employee was unwavering in his quest for his old job and not to be retrenched.

In the absence of a genuine attempt at seeking consensus, the retrenchment was procedurally unfair.

Substantive Fairness

The nature of the procedural unfairness is such that it also contaminates the substantive fairness of the dismissal. This litigation is not the moment for the Court to assess the skills and competence of the employee for his old job. That assessment should have been undertaken during the consultations. Furthermore, the employer did not plead these as reasons for not appointing him to his old job either in its statement of defence or the pre-trial minutes.

Mr Malan suggested to the employee that during the consultations neither party had mentioned or contemplated “bumping”. That may be so. Bumping is an industry term for a method of applying LIFO to avoid retrenchment. Even though they did not use the term during the consultations, the employer could have had no doubt whatsoever that the employee wanted his old job back, that he did not want to be retrenched six years before retirement and that only if the employer insisted on retrenching him did he want a package amounting to three years’ remuneration.

The prospect of retrenchment had been looming since 2004. The employer did not canvass with the employee options for remaining in employment if the Africa Division closed. The argument that the employee was equally well placed to offer options, including to transfer, does not hold in this instance because it was not the employee who contemplated retrenchment, but the employer. The prospect of retrenchment materialised for him only when he realised that the employer was reneging on its undertaking. Until then, he understood that his job was secure. Besides, the employer bears the onus of proving the fairness of the dismissal.

If there genuinely was no job for the applicant then, in the circumstances of this case in which the employer could not fulfil its undertaking, fairness required more than strict compliance with the statutory requirements. Although the employer offered in settlement, to pay a retrenchment package amounting to more than a week per year of service and to waive the three-year restraint of trade against the employee, it took refuge under the rules, applying them strictly when the employee refused to settle. In so doing, the employer lost sight of the human factor and the

intrinsic notion of fairness being more than strict application of the rules in certain circumstances. Although the LRA seeks to codify lawfulness and fairness, special circumstances as in this case may require an employer to do more than the minimum prescribed in the LRA.

The employer seemed to recognise this in making a settlement offer embodying more than the minimum allowed in law. To achieve a greater degree of substantive fairness the employer should have implemented its settlement offer without stipulating that it was conditional on the entire dispute being resolved. The settlement would then have served as evidence of the employer's empathy, humanity, good faith and commitment to achieving substantive fairness. It could also have had an effect similar to a payment into court, thereby conducing to settlement of the dispute, because the risk for an employee pursuing a claim for unfair dismissal in those circumstances would have been greater. Even if the Court found that the retrenchment was unfair despite an unconditional offer, a reasonable offer would have counted in the employer's favour.

The dismissal was therefore substantively unfair.

The Remedy

In devising a remedy the Court notes that the employer led no evidence that the employment relationship has broken down. Even if three years ago there was no position for the employee there is no evidence that that is still the case. The employer's financial standing today is also not before the Court.

Having found that the dismissal was procedurally and substantively unfair, the most appropriate remedy is to reinstate the employee. The employer can re-do the process fairly if it now has substantive grounds for retrenchment.

In granting this remedy the Court was struck by the appearance of the employee relative to his former colleagues and contemporaries. Boyd and Best have since retired, so has Warren. They appeared relaxed and comfortable in their retirement. Warren was enjoying his retirement and turned down an offer of a job because he did not need the money.

In contrast, the employee appeared stressed and worn. The retrenchment and the subsequent litigation must have taken their toll. The Court does not need medical evidence to make this observation. Further, in 2006 and 2007 he had to find employment outside South Africa's borders in order not to breach the restraint of trade. Working in Angola involved long hours and long absences from home, something which he had resisted whilst in full time employment. After 17 or 18 years' service the employee deserved better.

In calculating back pay the Court takes into account the remuneration that the employee received in 2006 and 2007, his delay in filing the pre-trial minute and the retrenchment package that he received on dismissal.

COURT GRANTS AN ORDER ON THE FOLLOWING TERMS:

1. The dismissal of the employee is procedurally and substantively unfair.

2. The employer is ordered to reinstate the employee effective from 1 November 2009.

53. The employer is directed to pay the employee the equivalent of twelve (12) months' remuneration.

4. The employer is directed to pay the employee's costs.

PILLAY D,J

IN THE KWAZULU-NATAL LABOUR COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO	:	D387/06
DATE	:	26 OCTOBER 2009

ROY SAUNDERS

versus

WACO AFRICA LIMITED

BEFORE THE HONOURABLE MADAM JUSTICE PILLAY

ON BEHALF OF APPLICANT	:	MR STEWART
ON BEHALF OF RESPONDENT	:	MR MALAN
INTERPRETER	:	NOT REQUIRED

EXTRACT
Judgment

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