IN THE LABOUR COURT OF SOUTH AFRICA

SITTING IN DURBAN

CASE NO

JS76/01

DATE

2003/01/31

In the matter between:

LEON SCHRÖDER (Applicant)

and

JOHN DANIEL CONTAINERS LTD (Respondent)

JUDGMENT DELIVERED BY
THE HONOURABLE MR ACTING JUSTICE NGCAMU

TRANSCRIBER
SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN

JUDGMENT

NGCAMU AJ

[1] The applicant was employed by the respondent from August 1999 as a draughtsman. When he started working for the respondent the workload was heavy. In February 2000, things did not look busy. There were talks of other contracts. The applicant realised that there were signs of possible retrenchment. He then went to see Mr Halls and told him that if there was going to be retrenchment he would like to be advised early. He was given the assurance that they would be given sufficient time.

[2] On the 1st September 2000 he received a letter from the respondent regarding retrenchment. The full text of the letter reads as follows:

"Mr L Schrцder.

It was expected that the fabrication output would have

increased during the past months but unfortunately no increase has taken place. It has therefore been decided to close the fabrication facility, in order to reduce operating costs to the minimum. We are presently in negotiations to secure working capital in order to continue with our marketing strategy and fabrication. We therefore regret to advise you that your services will be terminated on the 30th September 2000. We will, however, advise you immediately in the event of a change in the present circumstances.

Yours faithfully,

L F Harris."

[3] **Mr Schrцder and three employees were called to the board room. The letter was discussed. They were then told there were no other options. They made few comments during those discussions.**

[4] **He understood the fact of the letter to be that from the 1st October 2000 they could not be employed. They had a meeting between the four of them to decide what to do. Mr Conradie was mandated to have a meeting**

with the management. Mr Conradie undertook to speak to Mr Hall to ascertain if the letter was final or there would be a cancellation.

[5] Mr Conradie had a discussion with Mr Hall on the 6th September 2000 and made a report back to the other employees who had mandated him and these included the applicant. The report was that the letter was not going to be withdrawn but that the letter was not a retrenchment letter.

[6] Mr Conradie went to see a labour consultant. Conradie informed him that they had to get legal representation. A suggestion was made to write to Mr Harris and advise him that the retrenchment would not be accepted. He and Mr Conradie prepared the letter. This letter is dated the 7th September 2000 and it reads:

"Re letters received by staff on the 1st September 2000.

We have noted the content of the above letter. After a meeting was held between Mr L Harris and Mr P Conradie on the 6th September 2000 at 14:30, the

following was understood.

• Considering the content of the above letter, for which we signed receipt of, we hereby draw your attention to the fact that we do not waive any of our rights as permanent employees of John Daniel Containers Ltd.

• This letter is to notify management that all staff who receive the above letter on the 1st September 2000 do not regard the letter as a letter of dismissal and therefore confirm hereby that all staff are still employed by John Daniel Containers Ltd on the 1st October 2000 onward until further notice.

• We reserve all rights regarding the above.

Yours faithfully."

[7] The letter was presented to Mr Harris but he refused to withdraw the letter of the 1st September. The contracts were coming in and had a hope that the letter would be withdrawn. During the middle of the month he started making arrangements to secure his family outside Mossel Bay, in order to get employment. Arrangements were made to relocate to Gauteng so

that schooling of the children would not be interrupted.

[8] I should mention that during August 2000 the applicant had applied for leave to visit his parents in Johannesburg. The leave was granted. He had been granted leave from the 26th to the 29th September 2000. The 26th September was a Tuesday. His last working day was a Friday, the 29th September. Monday, the 25th was a public holiday. He moved his belongings to Johannesburg on the 25th September.

[9] He was aware of other contracts which were coming in but there were no specifics or changing of retrenchment. On the 25th September he received a telephone call from Mr Hall, who asked him if he would be coming back. His response was that he would, if required. On 27th September he was telephoned about the leave forms. He testified that there was general knowledge that if circumstances changed he would return to work but he had to get security for his family.

[10] He received no other contact with respondent until the end of September. On his arrival in Gauteng he

received legal advice, as a result of which an unfair dispute dismissal was lodged with the CCMA on the 30th September 2000. A copy was served on the respondent, as required by law. The respondent replied by letter dated the 2nd October 2000. The letter reads:

"Dear Sir,

<u>Alleged dispute referred to MEIBC: L Schrцder</u>

We acknowledge receipt of your referral to the MEIBC (Johannesburg) in the alleged dispute between L Schrцder and John Daniel Containers Ltd. As explained to Mr Schrцder during the board room discussion on the 1st September 2000, the retrenchment became an option, not a *fait accompli*. Mr Schrцder has, to this day, not been informed of any retrenchment details and, as such, his *status quo* is that of an employee of JDC. Irrespective of the progress of the procedures of retrenchment at JDC at present, it is common cause that Mr Schrцder has not been the subject of retrenchment to date. You will understand that with Mr Schrцder being on leave, he could not be included in the consultative and criteria

meetings held with staff and therefore he is left out of the process at this point in time. JDC cannot change the time frames for procedures because of one person being on leave.

Yours faithfully,

L F Harris."

[11] The applicant contends that the letter of the 2nd October 2000 does not say that there has been a change. His legal representative responded to the letter of the 2nd October by letter of the 11th October. Respondent responded by letter dated the 19th October 2000, the contents of which reads:

"Dear Sir,

<u>John Daniel Containers Ltd/Leon Schrцder</u>

We wish to refer to your letter dated the 11th October 2000 and confirm that we have noted the contents thereof. Your client's services were not unequivocally terminated in a letter dated the 1st September 2000. Your client was advised that in the event of orders not being obtained the fabrication facility would close down. Your client was also advised that we were in the

process of negotiations and that the possibility did exist that we would be able to carry on with the business of our company as usual. Your client was also advised that he would be informed on a continuous basis of the process and also in the event of a change of the circumstances. Various discussions took place between your client and Mr P C Conradie, who was representing the workforce, and also with the Technical Director, Mr D J Hall. The workforce was advised that if a situation should arise for the closure of the fabrication facility that the normal procedures would be followed in terms of the SEIFSA main agreement and such procedures were, in fact, implemented on the 2nd October 2000 and thereafter terminated on the 18th October 2000 as the company was successful in securing sufficient work. We have on record that although your client applied for leave, it was not his intention on his departure to return to his place of employment and that he, in fact, relocated his family to Gauteng without taking the trouble to discuss his concerns or intentions with the management. It also surprised us that your client did not furnish us with his

contact details, in order to advise him of the change of circumstances. As far as we are concerned, your client has absconded and did not report for duty after his leave period. We believe that your client has preempted a decision that has not been resolved by the Board and we believe also that your client is fully aware of the requirements of the retrenchment which we need to comply with in terms of the main agreement.

Yours faithfully,

John Daniel Containers Ltd."

[12] Under cross-examination, the applicant stated that he saw the letter of the 1st September 2000 as termination of employment. He confirmed that the meaning of the letter of the 6th September is that he will still be employed on the 1st October 2000. When asked to explain the contradiction in his evidence-in-chief, where he said he would be retrenched on the 30th September, he replied that the letter meant that they did not accept the fact that they could be retrenched.

[13] It was then put to him that it was accepted that the employment would continue. He disagreed with this suggestion. He was then asked why he was party to a letter if he did not abide with it. His response was that the respondent did not notify them in writing.

[14] In answer to the question why he was the only one who left employment, he responded by saying that others did not have responsibilities and others had no children. It was then put to him that he made a pro-active decision not to return for work.

[15] Applicant conceded that the respondent did not know that he was not going to return. It was put to the applicant that the letter of the 1st September was for information. It was further put to him that no services were terminated, to which he responded by saying that he had it in written form that he would be terminated. He further stated that he was not informed about the fact that his services were not terminated.

[16] This cannot be true, because the applicant received a

report of the meeting of the 6th September between Mr Harris and Mr Conradie, in which it was reported that the letter was not a termination letter. The applicant stated that he felt at risk because everything was verbal and Harris refused to reply to the letter.

[17] When he was asked to explain why he relocated his family, he stated that it was not the first time he had worked for a company which had problems and had to make arrangements for his family. He disputed that the letter of the 6th September rejected the retrenchment. This is somehow surprising because the letter clearly states that the retrenchment has not been accepted by the employees.

[18] It was then put to the applicant that he repudiated his employment by not returning on the 2nd October 2000. He responded by saying that the last letter informed him his services would not be required after the 30th September 2000. However, it is not in dispute that the applicant was on leave as at the end of September and he was therefore required to return to his employment

at the end of his leave. He stated that he did not return because the letter was not retracted and he had relocated.

[19] He denied that he had jumped the ship to get compensation. He stated that he was looking at long-term security of employment. He denied that Mr Conradie negotiated on his behalf and further stated that it was his legal right to decide whether to go back to his employment.

[20] The applicant conceded that the company did not close and that he would have known that in October 2000 if he had returned. When he was asked if he gave the company any opportunity to commence the retrenchment procedures he stated that the company had an opportunity before he went on leave.

[21] However, in this regard I must indicate that when the applicant went on leave it had been indicated to him through Mr Conradie that the letter of the 1st September was not a letter of termination and

therefore his answer to the question put to him cannot be accepted.

[22] The applicant further denied that he distanced himself from the procedures. Again, this is rather strange because if the applicant was aware that there were certain procedures taking place, he should have come back to the respondent and be part of the procedures. He could then make proposals if he wanted to make any.

[23] He was asked why he did not withdraw the action that he had instituted against the respondent. His response was, however, strange. He stated that he had incurred legal costs.

[24] He then testified that the termination occurred on the 1st September 2000. When it was put to him that the company corrected the situation at a meeting with Mr Conradie, he then stated that he did not have anything saying he would still be employed from 1st October 2000. This is again a ridiculous answer in my

view, because Conradie had been mandated by the employees, which included the applicant, to negotiate with the management and, in fact, the letter that was written in conjunction with the applicant directed to the company, indicates that the employees regarded themselves as being employees as at the 1st October.

[25] Mr Harris, the CEO of the respondent, testified as well. He testified that during the year 2000 there was a very low inflow of work. They had to have a serious look at the company. People in the company were consulted. They were also negotiating a large transaction.

[26] In a meeting on the 1st September 2000 the employees were advised that the manufacturing section will close down. He was hopeful to get the new contract. They were not sure when they would get the order. If they did not get the order, they would have to close on the 30th September 2000. He testified that the letter of the 1st September was not to terminate the contract but a starting point to inform the employees.

[27] He had a meeting with Mr Conradie on the 6th September, who explained that the letter of the 1st September was not clear. The letter was explained. He told Mr Conradie that there was no need to withdraw the letter but if the contract was not obtained there will be a consultation. The misunderstanding on the letter was cleared. There was no question of closing on the 30th September but there was a risk of consultation on retrenchment. This was agreed with Mr Conradie.

[28] The letter of the 7th confirmed what was discussed. The contract of employment remained in place.

[29] The consultation process started on the 26th September. He received a letter dated the 14th September from NUMSA, stating:

"Re: <u>Retrenchments</u>

It was brought to my attention that the company is in the process of retrenching workers. It is a contravention of the LRA because, as NUMSA, we did not receive any confirmation of your intention to retrench workers. It is therefore very important that

we meet so that we can clear the air. The proposed date is the 20th September 2000 at 11:00.

Yours faithfully,

National Union of Metal Workers of South Africa."

[30] He responded to this letter and stated that there was no final decision to retrench by the 30th September 2000. The Board had to take a decision to retrench. There was no contact with the applicant during that period. He was surprised to receive the letter from the applicant's attorneys because applicant was on leave. He was made to understand that applicant was not returning. Applicant was to return on the 2nd October 2000. He was not aware that the applicant had relocated to Gauteng. He got to know this when he started the process on the 26th September.

[31] He conceded that the letter of the 1st September was not clear but that it was cleared in a meeting with Mr Conradie. He stated that if applicant had returned, he would have been consulted. The process would have ended on the 18th October.

[32] **Mr Hall also testified on behalf of the respondent. He confirmed that there was a meeting with the employees regarding the respondent's situation and that a letter was issued by the company to the employees. He testified that the employees were informed that the letter of the 1st September was not appropriately worded and that the employees would still be employed on the 1st October 2000.**

[33] **The employees approached him on an informal basis about the situation. He further testified that the applicant had told him he would return after his leave. He had no idea the applicant was relocating.**

[34] **Mr Conradie, one of the employees, testified on behalf of the respondent. He confirmed receiving the letter of the 1st September. He further confirmed that there was a meeting with Mr Harris on the 6th September, which he attended, with the mandate of the employees, including the applicant. He obtained clarification to the letter of the 1st. He was advised that the retrenchment**

was not a *fait accompli*. It was accepted by all employees that the employment had not been terminated in terms of the letter of the 1st September. The applicant was informed of the position.

[35] A letter was addressed to the respondent on the 7th September with the assistance of the applicant. This was confirming the discussion of the 6th September. He testified that the employees were left with no doubt as to their employment and the respondent's intention which was to retain their services by the 1st October.

[36] He confirmed respondent's case that the employment relationship was not terminated on the 1st October 2000. I have no doubt that the witness, Mr Conradie, told the Court what he knew about this letter and I have no hesitation in accepting his evidence.

[37] In the light of the evidence presented, the Court is called upon to decide if the employment of the applicant was terminated. In this regard, it is common cause that a letter was issued by the respondent

advising the employees of the termination of employment. This was not accepted by the employees and Conradie was mandated to discuss the issue with the respondent. The discussions revealed that the letter was not a termination letter. This is what was understood by Mr Conradie and related to the employees, including the applicant.

[38] The applicant co-authored the letter to the respondent, confirming the discussion between Mr Conradie and the respondent. From the contents of this letter it is clear that the contracts would still be intact as on the 1st October.

[39] The applicant decided to relocate to Johannesburg. On the evidence, I am satisfied that he was aware that there was not going to be any termination at the end of September but because of past experience he felt the company was going to go under and decided to leave without advising the respondent.

[40] I am satisfied that when he left for Johannesburg he

had formed an intention of not returning. The applicant has stated that he had children and a wife to look after and therefore had some responsibility which the others did not have, and for that reason he had to secure himself and his family.

[41] When the applicant had referred a dispute, it was made clear to his attorneys that there had been no dismissal and that the applicant was still in the employ of the respondent. Another letter dated the 19th October 2000 confirmed that there was no termination of employment and that the respondent was not going to proceed with any retrenchment.

[42] I am satisfied that the applicant did not have any intention to return to his work. He was advised that the respondent was not proceeding with any retrenchment. He was unemployed for a long period of time but did not see fit to take up his employment if he was keen to work for the respondent.

[43] I cannot accept the applicant's explanation that the

letter from the respondent dated 2nd October 2000 did not come within the period of September 2000 and that this was the reason he did not return. The question that arises then is whether the applicant wanted his employment or not. Clearly, applicant did not want his employment.

[44] His response that he did not return because he acted on the advice of his representative cannot also be accepted for the reason that the evidence shows clearly that he relocated to safe haven for his family. He did this even before obtaining legal advice in Johannesburg.

[45] He had been assured by Mr Conradie that there was not going to be any dismissal. The letter of the 1st therefore becomes irrelevant in the light of the discussions between Mr Conradie and the management which took place on the 6th September. It is therefore not clear why the applicant still entertained an impression that his services were going to be terminated on the last day of September when this had

been confirmed by Mr Conradie, who had been mandated by the employees to clear the air with the management.

[46] I reject the suggestion that Mr Conradie was not acting on behalf of the applicant. Conradie was mandated by the employees, including the applicant. Applicant also co-authored a letter to the management. I find it very strange that he now dissociates himself from the letter which he co-authored.

[47] I am satisfied that no employment was terminated, either for the applicant or any other employee. The employees, including applicant, rejected the termination set out in the letter of the 1st September. This is common cause and confirmed in a letter dated the 7th September addressed to the respondent. Had there been no understanding or agreement reached with Mr Conradie which was conveyed to the applicant, the position might have been different.

[48] The respondent's position is further strengthened by

the fact that the applicant was advised on the 2nd October that his employment still existed. When he was asked on the telephone whether he was going to return, his answer was that he was going to return if he was required. In this case I must indicate that the applicant has indicated that he did not return because of the letter of the 1st September. If that is the case, then his answer to the effect that he would return if he is required is not understood.

[49] In the light of the evidence presented, I find that the applicant was in no way dismissed by the respondent. In fact, he decided to jump the ship because he was of the view that the company was going to go down and because he felt that his future was uncertain in the company. He did not want to be involved in a retrenchment as a result of his past experience but the evidence presented does show that, in fact, the respondent was trying by all means to retain the job of the employees and, in fact, did retain the job of the applicant. If the applicant wanted to take up his job, he would not have stayed in Johannesburg, even after he

had been advised that there was no retrenchment process.

[50] I am therefore of the view that the applicant instituted this action in order to get money to settle himself in Johannesburg.

[51] In view of the decision I have taken with regard to the dismissal, I find that there is no need for me to deal with other issues raised in the pleadings. I will therefore make no further findings on that.

[52] With regard to the question of costs, I find that the applicant was aware his services had not been terminated at the time when he referred the dispute. Any uncertainties had been cleared in a meeting with Mr Conradie. The respondent also cleared the position in the letters addressed to the attorneys acting for the applicant. He was clearly advised that he was not dismissed but because he wanted to stay in Johannesburg, where his parents were, he did not want to return but opted to institute this action to get money

for himself.

[53] In the circumstances, I find that it would be fair that I make an order that the applicant pays the respondent's costs in this action.

[54] The order that I make is therefore the following:

1. The applicant was not dismissed.

2. The application is dismissed.

3. The applicant is ordered to pay the respondent's costs.

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LEGAL REPRESENTATION:

CANT: MR J D VERSTER

ONDENT: MR L VAN RENSBURG

HEARING: **15/10/2002 TO 16/10/2002**

JUDGMENT: **31/1/2003**
