REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Not of interest to other judges

Case no: JS 747-2014

In the matter between

ZULU S **APPLICANT**

and

ROBOR (PTY) LIMITED **RESPONDENT**

Heard: **12 and 13 May 2016**

Delivered: **23 June 2016**

Summary: **Retrenchment – settlement agreement – whether binding on the employee.**

JUDGMENT

COETZEE AJ

[1] The applicant is Sibongile Zulu, an adult female accountant.

[2] The respondent is Robor (Pty) Ltd, a private company duly registered in terms of the laws of South Africa. The respondent is a large company that at the time conducted its business through various divisions.

[3] The applicant was employed by the respondent as a Group Financial Accountant in the Finance Department of its Shared Services Division. The latter division was housed at head office.

[4] The applicant claims an unfair dismissal for operational requirements. She claims that the dismissal was both substantively and procedurally unfair. She claims compensation only.

[5] The applicant commenced her employment on 1 March 2013 reporting to the respondent's Group Financial Manager, Christine Stirling ("Stirling").

[6] In her position as Group Financial Accountant, the applicant was responsible for amongst others receiving and processing all the requests for finance from all the various divisions of the respondent. She was the only one with those functions.

[7] The respondent raised as a point *in limine* that the court did not have jurisdiction to entertain the claim as the matter was *res judicata*.

[8] This defence is based upon the allegation that the applicant signed an agreement in full and final settlement of all the claims against the respondent.

[9] The applicant does not dispute that she signed the agreement.

[10] The applicant disputes that the agreement binds the applicant or is a defence to her claim that she was unfairly dismissed.

[11] The respondent has submitted that until such time as the settlement agreement has been set aside there can be no dispute between the parties to be determined by this court.

[12] The Labour Appeal Court recently in *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and Another*[1] confirmed that the courts will not easily interfere with an agreement settling a dispute between the parties. In this case, the applicant wished to have the agreement set aside as he pleaded that he signed the agreement under duress. The application was dismissed.

[13] The courts have jurisdiction in an alleged unfair dismissal claim to scrutinise the contents of a settlement agreement to determine if there was a dismissal and if it was fair.[2]

[14] Towards the end of October 2013, the respondent issued to the applicant and all other employees of the Shared Services Division a notice in terms of section 189A (3) ("the notice"). The notice concluded by stating that notice of future consultations would be given in due time.

[15] The parties prepared heads of argument on the assumption that it was a section 189 notice. When requested, they presented supplementary heads on the question whether it was competent for this court to consider any alleged procedural unfairness by virtue of the provisions of section 189A (18).

[16] The parties are not in agreement that the notice was in fact a section 189A notice. The respondent is of the view that it is a notice in terms of section189A. The applicant is of the view that it is not.

[1] (JA95-2014) [2016] ZALAC 2 (3 February 2016)
[2] *Hodges v Urban Task Force Investments CC and Others* (JR840-12) [2013] ZALCJHB 295 (7 November 2013); *Brown v Afgri Producer Service (Division of Afgri Operation Limited)* (JS436-06) [2008] ZALC 138 (31 October 2008); *Metjielies v Stratostaff (Pty) Limited T/a Adecco* (P294-12) [2015] ZALCPE 3 (27 January 2015) and see also *Ford v Austin Safe Co (Pty) Ltd* (1993) 14 *ILJ* 751 (IC) and *Maetisa v Pernod Ricard SA Ltd* (2013) 34 *ILJ* 2044 (LC).

[17] The notice clearly sets out and purports to be a section 189A notice. The notice further provides as follows:

> 'Robor currently employs 906 employees and 150 employees have been dismissed based on its operational requirements in the preceding twelve months.'

[18] The applicant is correct in its submission that it cannot be a section 189A (3) notice as the notice says, as this subsection deals with the appointment of a facilitator. The notice, however, is a notice in terms of section 189A although in terms of subsection (1).

[19] As the notice is in respect of a process contemplated in section 189A, the further provisions of this section apply. Subsections (13) and (18) provide that the Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191 (5) (b) (ii). This dispute has been referred to the Labour Court in terms of section 191 where section 198A applies.

[20] The applicant further submitted that as the notice was directed at one employee only, it could not be one issued in terms of section 189A. The submission cannot be correct as the company stated that it had already dismissed 150 employees during the previous twelve months.

[21] The respondent submitted that as it was a dismissal pursuant to section 189A, the court has no jurisdiction subsequently to deal with any alleged procedural unfairness.

[22] I am not persuaded by the applicant's submission that alleged procedural unfairness may still be decided at this point in time.

[23] This judgement, therefore, deals with the substantive fairness of the dismissal.

[24] The applicant disputes that there was a reason to make her position redundant. The respondent's witnesses testified that there was a fair substantive reason.

[25] The notice states:

> 'In consequence of an exercise which is being been [sic] undertaken by the Company, certain proposals are in the process of being considered which may, in effect, result in the termination of the employment of certain individuals based on the Company's operational requirements.
>
> The exercise has been premised, based on the intentions of the Company to restructure certain departments and divisions on the Elandsfontein site to in some measure manage the overhead costs of the Company. Following the CEO's road shows earlier this year certain future plans were shared and in the interests of being morally correct we believe that we need to alert our staff about these possible changes …
>
> …
>
> In consequence of this, it may become necessary to contemplate the termination of the employment of some employees throughout the site. Although this aspect will be canvassed more fully during the course of the ensuing consultation process, prior to proposing termination of employment based on operational requirements, the following were considered...
>
> …
>
> The selection criteria will be discussed in the course of the consultation process.'

[26] The respondent's witnesses testified that two whole divisions were closed down and the other seven were consolidated into one.

[27] The applicant's evidence was that when they received the notices, they were told not to worry about the notices as they would not be affected is unlikely. She testified that a director of the company handed out the notices. She could not identify the director. According to her, he made a joke of it and said it would not take long. He further mentioned that they could not be retrenched; there was no risk at

head office where she was working. He further told them not to take out new bonds until everyone knew what was happening.

[28] The reason for the possible termination of employment was given as restructuring of certain departments to in some measure manage to overrate costs of the company. In order to achieve this purpose, it was necessary to restructure certain departments and divisions.

[29] The company, over the prior three years, went through large-scale retrenchments. Nobody in the company was spared. Even the CEO received a notification which was only withdrawn when the process was finalised.

[30] Stirling had 28 people reporting to her. The eighteen financial accounts were consolidated into one served by one financial accountant.

[31] Stirling testified that it subsequently became clear that the company was to rationalise the Shared Services Division. In this division, there was a section dedicated to each of the divisions of the company. In terms of the new structure, one unit or section would serve all the remaining divisions. The seven units were all moved into one unit. For instance, all of the management accounts in the new structure went to head office for the whole of the company and not as previously in respect of each of the divisions.

[32] As a result of the process, quite a number of employees with in Shared Services were retrenched. Currently, a substantially reduced number of employees in her section serve all the divisions within the company. They are not working more but they are working smarter. The position of the applicant became redundant as those functions were absorbed into the functions of other employees or fell by the wayside.

[33] Stirling was the general manager of Shared Services for the whole of the group. The company originally had nine divisions of which two had

been closed down. At the time, it had seven divisions with seven financial departments each with a director and members of staff.

[34] Stirling testified that she was handed the notices. She was instructed to hand out the notices to all the employees in her department. She was handed a similar notice at the time. She handed notices to all the employees in her department including one to the applicant.

[35] Stirling denies that when she handed the notice to the applicant, and for that matter to the other employees, she expressed a firm view that it was a mere formality and that she and the employees in her department were not really affected.

[36] Stirling's evidence is to be accepted to that of the applicant that Stirling and not an unidentified director handed out the notices. There is no reason for her not to have done that, especially, as she herself had received one and was in charge of the department.

[37] Her further evidence that she, at the time, did not know anything more than what she had been told (and that was to hand out the notices) and that everybody was affected seems feasible. The process was driven from above. She had no knowledge to impart to the other employees to the effect that they need not worry as they would not be affected.

[38] During the morning of 19 November 2013, the applicant was requested to attend a meeting. Present were amongst others Stirling, Pauline Harvey and the applicant.

[39] This was the first meeting arranged pursuant to the notice. It is common cause that the applicant was called on short notice and without prior warning to attend the meeting.

[40] In the meeting, the HR manager Pauline Harvey explained the restructuring and that the applicant's position became redundant. She conceded that the applicant seemed surprised that her job had become redundant as according to her, she was very busy. The

selection criteria were not discussed as only her position at the time was redundant and there was no selection to be done between more than one.

[41] The applicant on her own admission in fact raised the issue of selection criteria which shows that she participated in the meeting.

[42] The HR manager explained the separation benefits and the procedure going forward.

[43] The applicant did not raise a complaint during the meeting.

[44] It was not the applicant's case that there was an alternative position for her. Stirling confirmed that this was in fact the case as a result of the consolidation of the various functions into one unit to serve the whole of the company instead of separate units serving seven divisions. The functions of the applicant were absorbed partly by Stirling and partly by others.

[45] The position of the applicant has not been filled as the functions were consolidated into the new unit.

[46] Pauline Harvey explained that the restructuring process involved consolidating the seven divisions into one. The process was driven from senior management downwards.

[47] At the commencement of the restructuring process, the unions were involved and consulted. Thereafter, the positions of individual affected employees were addressed. The first step was to set up a meeting to attempt to agree on a settlement acceptable to the employee.

[48] During such a discussion, alternative positions if any were raised. The employee could also indicate whether there were any alternative positions or alternatives to dismissal. If there were no alternatives or alternative positions as was the case in this matter and it was not possible to come to an agreement, the section 189A process would be followed.

[49] Pauline Harvey testified that this was a meeting to attempt to settle the matter and she explained to the applicant the process. She also explained the reasons for the proposed dismissal and that as a result of the consolidation of the divisions there was no alternative position available. Stirling was present to confirm this.

[50] When the applicant did not raise any objection, Harvey informed the applicant that she would draft a letter for the applicant's signature.

[51] They parted on the basis that Pauline Harvey would let her know when she could come and sign the letter.

[52] Later during the day, Harvey called the applicant to her office. They sat down and Pauline Harvey explained to her the contents of the letter. She went through the contents of the letter and explained that to the applicant. This letter in fact is the document that the applicant signed in full and final settlement of all claims and is referred to as the settlement agreement. The relevant paragraph on the first page reads as follows:

> 'The above will constitute **a full and final settlement** of all any claims which you may have arising from or in connection with your employment with the Company and the subsequent termination thereof.'

[53] Harvey denied that the applicant could have been under a misunderstanding. She testified that they spoke about the applicant becoming redundant and would be paid severance pay. She also explained to the applicant the proposed settlement. She would be paid a month's notice instead of notice of two weeks. Although she did not qualify for severance pay, she would be paid one week as she had worked part of a year.

[54] She denied the applicant's version that it was not explained to her what the document means. She also denied the applicant's version that they did not sit down in Pauline Harvey's office but as applicant testified that they stood at the door as Harvey was in a hurry to attend

another meeting. Harvey said she had no other meeting that afternoon.

[55] What makes the applicant's version improbable is that she testified that the "full and final settlement" part was in small print hidden in the text of the settlement agreement. She did not see it. This evidence is not true as this part of the agreement was in bold and underlined. Also the applicant later testified that she saw the phrase but did not understand it. She also did not query it with the respondent while she was still there.

[56] It was the applicant's version that the document that she signed was not one in full and final settlement and that it was not binding upon her. She gave a number of explanations as to why she signed the document but did not understand that it meant that it was in full and final settlement.

[57] The first explanation was that it was necessary for her to sign a document to get her severance pay. That is what she was told and that is why she signed it. This is unconvincing as she would be entitled to severance pay if so promised.

[58] A second explanation was that she was informed that the document was only about the salary for November and December and without signing the document, she would not get paid. This explanation flies in the face of the fact that previously at the end of every month, she was paid without having to have signed a document.

[59] She also explained that she only read the last page with the amounts to be paid to her. She did not have the opportunity to read the rest of the document. She was directed to the portion of the document where she had to sign without having had the opportunity to read through all of it.

[60] She also testified that she was still shocked and pressurised and could not ask for an indulgence to first read the document.

[61] It is not in dispute that in terms of the settlement, she received more than what she would have received by way of severance benefits and contract. She was only entitled to two weeks' notice pay and received a month's notice. She received one week's severance pay while she did not qualify for severance pay in terms of the Basic Conditions of Employment Act.

[62] The applicant testified that she arrived late at work on the morning of 19 November 2013. When she was notified to attend the meeting, she thought it was because she was late. She hurried to the meeting. She regarded Stirling as a harsh manager that would not condone any delay in going to the meeting.

[63] In the meeting, she was shocked to hear that her position was regarded as redundant. She did not agree to anything. She conceded that she did not raise any particular point or matter except for asking about the selection criteria.

[64] Stirling testified that she on one occasion had to reprimand the applicant for a pattern of late coming. She discussed this with the applicant and life went on.

[65] The applicant also portrayed Stirling as one demanding lots of unpaid overtime during the week and over weekends. Stirling explained that she never wished the employees to work over weekends and she ensured that by 18:00 all had left. The only weekend to work was the first one in October in preparation for the year-end reports.

[66] Stirling has been with the respondent for over 30 years and it is unlikely that such a tough and unreasonable task master as the applicant portrayed her to be would have survived that long.

[67] Applicant said the same happened when she was later called to the office of the HR manager to sign the agreement. She felt shocked, rushed and under pressure. According to her, the HR manager rushed her into signing the document without explaining the contents. All that was explained to her was the monetary part.

[68] The employer points out that her version that she did not sign the agreement voluntarily is unlikely. The applicant remained at the office until the end of November 2013. During that period, she did not raise any objection against the agreement.

[69] Her version does not explain why she did not raise an issue in respect of the agreement before she left her employment. She, in fact, asked for a copy of the notes of the meeting of 19 November 2013. The HR manager provided her with those notes on or about 21 November 2013 after she had signed the agreement. The covering email invited her to discuss any aspect thereof with the HR manager. One would have expected her to take up the invitation if she had any doubts about the document she had signed.

[70] She also knew that she was leaving and what she would be paid. She is an educated employee with a degree. Her evidence that she did not understand that it was in full and final settlement cannot be true. The explanation that she did ask one or two people what it meant but still did not understand the consequences is improbable.

[71] It is more likely that the applicant after leaving the employment of the company came to believe that her position had been filled by somebody else and that she was the only person dismissed for operational requirements. Those, however, are not the facts. More people lost their jobs and her position had never been filled.

[72] It is more likely that she understood what was happening during the meeting of 19 November 2013 and during the subsequent event in the office of the HR manager when she signed the document.

[73] She has also accepted all the benefits from the agreement without demur.

[74] The employer had the onus to show that an agreement was concluded. The employee admitted signing the document. She denies that she knew what she was signing. The respondent's version is the more probable one in view of her education, seniority and experience.

[75] Her denial that she saw that it was in full and final settlement casts doubt on her version. That part of the agreement is in bold and underlined and clearly stands out on the first page of the document. It can hardly be missed.

[76] The respondent has discharged the onus to show that the applicant has compromised her claims by way of agreement.

[77] There is no basis upon which the Court can find that she was dismissed and that such dismissal was unfair. Her employment terminated by mutual agreement.

[78] Both parties submitted that costs should follow the result. This is in accordance with the law and fairness.

[79] I make the following order:

79. The claim is dismissed with costs.

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Coetzee, AJ

Acting Judge of the Labour Court

Appearances:

For the applicant:	Adv S van Vuuren
Instructed by:	Nkosi Ntlantla Inc Attorneys
For the Respondent:	CJ Geldenhuys of Geldenhuys CJ @ Law